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1279

No. 3591

1280

United States
Circuit Court of Appeals

For the Ninth Circuit.

PHELPS DODGE CORPORATION, a Corpora-
tion,

Plaintiff in Error,

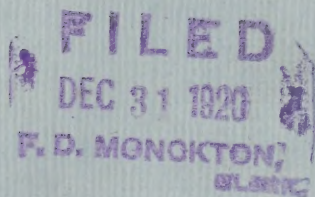
vs.

EPIFANIO GUERRERO,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Arizona.



United States
Circuit Court of Appeals
For the Ninth Circuit.

PHELPS DODGE CORPORATION, a Corpora-
tion,

Plaintiff in Error,


vs.

EPIFANIO GUERRERO,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Arizona.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

Messrs. ELLINWOOD & ROSS, Bisbee, Ariz.,

JOHN E. SANDERS, Esq., Bisbee, Ariz.,

JAMES S. CASEY, Esq., Bisbee, Ariz.,

Attorneys for Plaintiff in Error.

L. KEARNEY, Esq., Clifton, Ariz.,

JAMES R. DUNSEATH, Esq., Tucson, Ariz.,

Attorneys for Defendant in Error.

In the District Court of the United States for the
District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corpora-
tion (Morenci, Arizona Branch),

Defendant.

Complaint.

That plaintiff is a resident of the county of Greenlee, State of Arizona, and a citizen of the Republic of Mexico.

2.

Defendant is a corporation duly organized under the laws of the State of New York, and is a citizen of the State of New York; that defendant has filed the appointment of its statutory agent in the office of the Arizona Corporation Commission, at Phoenix, Arizona, and in the office of the county recorder of said county of Greenlee; that it has filed its articles

of incorporation in the office of said corporation commission, and caused the same to be published for six issues in a newspaper published at said county of Greenlee, and that it has fully complied with all the requirements of law pertaining to foreign corporations doing business in the State of Arizona, and during the times and places herein mentioned it was, has been, and yet is, such corporation, engaged in the business of mining, smelting, conducting machine-shops, carpenter-shops, concentrator works, electric plants, railroading, and in other pursuits and industries, at the town of Morenci, county of Greenlee, State of Arizona, in its corporate name, Phelps Dodge Corporation.

3.

That prior to and on January 20th, 1919, and at the time the plaintiff received the injuries herein complained of, he was employed by and in the employment of the defendant. The defendant is the owner of a mine at Morenci, in said Greenlee County, which mine is commonly known as London mine; that in said mine on or about the 20th day of January, 1919, the plaintiff was employed as a miner [1*] by the defendant; that on said day while in said employment, while engaged in said work for the defendant, and while acting within the scope of his duties and while acting under said contract of employment as such employee of the defendant, the plaintiff received injuries to his eyes in said mine.

*Page-number appearing at foot of page of original certified Transcript of Record.

4.

That the said injuries to plaintiff were occasioned by the condition and conditions of his said employment while working in the hazardous employment as a miner in defendant's said mine and in a stope or tunnel of defendant's said mine while underground; that the circumstances and conditions of said injuries and of said stope or tunnel were as follows:

That on or about January 20th, 1919, the plaintiff was employed as a miner and mucker, by the defendant, to break large rocks and boulders with a sledge-hammer into small pieces so the same could be removed from said mine, the plaintiff performing this work of breaking up said boulders in a stope of said mine for the defendant; that while engaged in his said work of breaking up boulders with a sledge-hammer, in a stope in said mine, under the directions of defendant and under said contract of employment, and as plaintiff was striking a boulder to break the same with a sledge-hammer, in the line of his duties as such employee, small particles of rock flew off from a boulder as plaintiff struck the same with a sledge-hammer and the same flew into and violently struck in his eyes, and as the said particles of rock struck the plaintiff into his eyes it produced in him weak, giddy and confused condition, and which said rock striking him in his eyes has ever since caused much injury to both his eyes, and has practically caused the loss of his left eye, and he has now as the result of said injury very faint vision in his left eye, and that said in-

jury has greatly disorganized his nervous system, and that on account of said injuries he has for a long time been compelled to be under treatment of a physician, and has necessarily spent large sums of money for travel to reach eye specialist for treatment and paid out considerable sums for doctor bills; that ever since said injuries he has been under [2] treatment of skilled physicians and surgeons, but has been unable to recover from said injuries, and that his conditions are such that he never will be able to recover from said injuries, and that as a direct result of said accident, he is greatly injured in body, mind and eyesight; that since said injuries he has not been able to perform any kind of work, and never will be able to follow his vocation as a miner or pursue gainful occupations, and that his said injuries are permanent; that ever since said injuries, and as a result thereof, he has suffered great mental and physical pain, and yet suffers and will continue to suffer pain. That said injury was an accident, and that said injuries and pains are the approximate result of said accident.

5.

That at the time of said injuries the plaintiff was engaged in manual and mechanical labor in the employment of the defendant as a miner underground in defendant's said mine; that said injuries were the result of an accident due to the condition of such occupation and of the place where the plaintiff was at work; that said injuries were not caused by the negligence of the plaintiff; that said injuries were the natural and proximate result of said

condition or conditions of the employment of said plaintiff within said mine and of the place of the performance of said work.

6.

That plaintiff at the time of his said injuries was 34 years of age, and was a skilled workman, and then earning wages of \$4.30 per day, \$111.80 per month of 26 days, and for the year \$1,341.60, and capable of earning such wages within the line of his said employment, as such skilled worker; that he was strong, healthy, able-bodied, and never had had any sickness, and was intelligent and industrious; that his expectancy of life at the time of said injuries was 32.50 years; that since said injuries plaintiff has been unable to perform any kind of labor and has lost in wages on account of said injuries at the time of filing this complaint, \$671.30.

That in view of said premises the plaintiff has been and is damaged in the sum of twenty thousand dollars, for which defendant is liable. [3]

7.

This action is prosecuted under the provisions of Chapter 6, Title 14, Civil Code of Arizona, known as the Employers' Liability Law.

WHEREFORE, plaintiff demands judgment against defendant for the sum of twenty thousand dollars, together with the cost of this action.

L. KEARNEY,

Attorney for the Plaintiff.

[Endorsements]: Epifanio Guerrero vs. Phelps Dodge Corporation, a Corporation (Morenci, Ari-

zona Branch). Complaint. Filed June 19th, 1919.
Mose Drachman, Clerk. By Effie D. Botts, Deputy.
[4]

In the District Court of the United States for the
District of Arizona.

No. 219.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corpora-
tion,

Defendant.

Answer.

Comes now the above-named defendant, and answers the complaint of the above-named plaintiff herein as follows:

DEMURRER.

Answering said complaint, defendant demurs thereto, on the following grounds, to wit:

I.

That it appears upon the face of said complaint that this Court has no jurisdiction of the subject of this action.

II.

That it appears upon the face of said complaint that the same does not state facts sufficient to constitute a cause of action. [5]

WHEREFORE, defendant prays judgment as to the sufficiency of said complaint, and for its costs.

PLEA IN BAR.

Further answering said complaint, but without waiving its foregoing demurrer, defendant admits the allegations of Paragraph II of said complaint, and denies each and every, all and singular, the remaining allegations in said complaint contained.

WHEREFORE, having fully answered, defendant prays that plaintiff take nothing by this action, and for its costs.

ELLINWOOD & ROSS,
CLIFTON MATHEWS,
Attorneys for Defendant.

[Endorsements]: Epifanio Guerrero, Plaintiff, vs. Phelps Dodge Corporation, a Corporation, Defendant. Answer. Filed July 14th, 1919. Mose Drachman, Clerk. [6]

In the District Court of the United States for the
District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corpora-
tion (Morenci, Arizona Branch),
Defendant.

Amended Complaint.

That plaintiff in this, his amended complaint, alleges that he is a resident of the county of Greenlee,

state of Arizona, and he is a citizen of the United States of the Republic of Mexico.

2.

Defendant is a corporation duly organized under the laws of the state of New York, and is a citizen of the state of New York; that defendant has filed the appointment of its statutory agent in the office of the Arizona Corporation Commission, at Phoenix, Arizona, and in the office of the county recorder of said county of Greenlee; that it has filed its articles of incorporation in the office of said corporation commission, and caused the same to be published for six issues in a newspaper published at said county of Greenlee, and that it has fully complied with all the requirements of law pertaining to foreign corporations doing business in the state of Arizona, and during the times and places herein mentioned it was, has been, and yet is, such corporation, engaged in the business of mining, smelting, conducting machine-shops, carpenter-shops, concentrator works, electric plants, railroading, and in other pursuits and industries at the town of Morenci, county of Greenlee, state of Arizona, in its corporate name, Phelps Dodge Corporation.

3.

That prior to and on January 20th, 1919, and at the time the plaintiff received the injuries herein complained of, he was employed by and in the employment of the defendant. The [7] defendant is the owner of a mine at Morenci, in said Greenlee county, which mine is commonly known as the Lon-

don mine; that in said mine on or about the 20th day of January, 1919, the plaintiff was employed as a miner by the defendant; that on said day while in said employment, while engaged in said work for the defendant, and while acting within the scope of his duties and while acting under said contract of employment as such employee of the defendant, the plaintiff received injuries to his eyes in said mine.

4.

That the said injuries to plaintiff were occasioned by the condition and conditions of his said employment while working in the hazardous employment as a miner in defendant's said mine and in a stope or tunnel of defendant's said mine while underground; that the circumstances and conditions of said injuries and of said stope or tunnel were as follows:

That on or about January 20th, 1919, the plaintiff was employed as a miner and mucker, by the defendant, to break large rocks and boulders with a sledge-hammer into small pieces so the same could be removed from said mine, the plaintiff performing this work of breaking up said boulders in a stope of said mine for the defendant; that while engaged in his said work of breaking up boulders with a sledge-hammer, in a stope in said mine, under directions of said defendant and under said contract of employment, and as plaintiff was striking a boulder to break the same with a sledge-hammer, in the line of his duties as such employee, small particles of rock flew off from a boulder as

plaintiff struck same with a sledge-hammer and the same flew into and violently struck in his eyes, and as the said particles of rock struck the plaintiff into his eyes it produced in him weak, giddy and confused condition, and which said rock striking him in his eyes has ever since caused him much injury to both his eyes, and has practically caused him the loss of his left eye, and he has now as a result of said injury very faint vision in his left eye, and that said injury has greatly disorganized his nervous system, and that on account of said injuries he has for a long time been compelled [8] to be under treatment of a physician, and has necessarily spent large sums of money for travel to reach eye specialist for treatment and paid out considerable sums for doctor bills; that ever since said injuries he has been under treatment of skilled physicians and surgeons, but has been unable to recover from said injuries, and that his conditions are such that he never will be able to recover from said injuries, and that as a direct result of said accident he is greatly injured in body, mind and eyesight; that since said injuries he has not been able to perform any kind of work and as a proximate result of said injuries he is permanently incapacitated to perform the work of a miner or any other manual labor, whereby his capacity to labor and earn money has been greatly and permanently diminished; that ever since said injuries and as a result thereof he has suffered great mental and physical pain, and yet suffers and will continue to suffer pain. That said injury was an accident, and

that said injuries and pains are the approximate result of said accident.

5.

That at the time of said injuries the plaintiff was engaged in manual and mechanical labor in the employment of the defendant as a miner underground in defendant's said mine; that said injuries were the result of an accident due to the condition of such occupation and of the place where the plaintiff was at work; that said injuries were not caused by the negligence of the plaintiff, that said injuries were the natural and proximate result of said condition or conditions of the employment of said plaintiff within said mine and of the place of the performance of said work.

6.

That the plaintiff at the time of his said injuries was 34 years of age, and was a skilled workman, and then earning wages of \$4.30 per day, \$111.80 per month of 26 days, and for the year \$1,341.60, and capable of earning such wages within the line of his said employment, as such skilled worker; that he was strong, healthy, able-bodied and never had any sickness, and was intelligent and industrious; that his expectancy of life at the [9] time of said injuries was 32.50 years; that since said injuries plaintiff has been unable to perform any kind of labor and has lost wages on account of said injuries at the time of filing this complaint \$671.30.

That in view of said premises the plaintiff has been and is damaged in the sum of twenty thousand dollars, for which defendant is liable.

7.

This action is prosecuted under provisions of Chapter 6, Title 14, Civil Code of Arizona, known as the Employers' Liability Law.

WHEREFORE, plaintiff demands judgment against defendant for the sum of twenty thousand dollars; together with the costs of this action.

L. KEARNEY,
Attorney for the Plaintiff.

[Endorsements]: Epifanio Guerrero, Plaintiff, vs. Phelps Dodge Corporation, a Corporation (Morienc, Arizona Branch), Defendant. Amended Complaint. Filed March 3d, 1920. C. R. McFall, Clerk. By J. Lee Baker, Chief Deputy. [10]

In the District Court of the United States, for the
District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corporation,
Defendant.

Special Demurrer to Amended Complaint.

Comes now Phelps Dodge Corporation, defendant above named, and specially demurs to the amended complaint herein, on the ground that it appears upon the face of said amended complaint that plaintiff is not a citizen of any state of the

United States, but is a citizen of the Republic of Mexico, and that defendant is a corporation duly organized under the laws of the State of New York, and is, therefore, a citizen and inhabitant of the State of New York, and not an inhabitant of the District of Arizona, and that, for the reasons in this demurrer set forth, this Court has no jurisdiction of this action.

WHEREFORE, defendant prays that this demurrer be sustained, and that plaintiff's action be dismissed.

ELLINWOOD & ROSS,
CLIFTON MATHEWS,

Attorneys for Defendant.

[Endorsements]: Epifanio Guerrero, Plaintiff, vs. Phelps Dodge Corporation, a Corporation, Defendant. Special Demurrer to Amended Complaint. Filed October 11, A. D. 1919. Mose Drachman, Clerk. By Effie D. Botts, Deputy Clerk. [11]

In the District Court of the United States, for the
District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corpora-
tion,

Defendant.

Motion to Strike Special Demurrer to Amended Complaint.

Plaintiff moves the Court for an order striking from the files and records of this cause the defendant's "Special Demurrer to Amended Complaint," on the following grounds:

(1) Because the defendant did heretofore, in the first instance, file herein its answer to plaintiff's complaint, which answer is a general appearance, and that by such appearance the defendant waived all questions of venue.

(2) Because on the call of the Court calendar for setting cases for trial at this term, after plaintiff had amended his complaint by writing therein, "and is a citizen of the republic of Mexico," it was then and there agreed, in open court, that the demurrers then contained in defendant's answer on file herein should be considered as pending against plaintiff's complaint so amended, and which said answer after said agreement then was a general appearance, and that it waived all questions pertaining to venue and jurisdiction of this court over the person of the defendant.

(3) The so-called "special demurrer" does not conform to the provisions of sec. 459, Civil Code, Rev. Stat. Ariz. 1913, in that there is no claim that defendant appears specially for the sole and only purpose of objecting to the jurisdiction of the court.

L. KEARNEY,
Attorney for Plaintiff. [12]

[Endorsements]: Epifanio Guerrero vs. Phelps Dodge Corporation, a Corporation. Motion to Strike from the files the Special Demurrer of Defendant. Filed October 15, 1919. Mose Drachman, Clerk. By Effie D. Botts, Chief Deputy Clerk. [13]

At a regular term, to wit, the May, 1920, term of the District Court of the United States for the District of Arizona, held at the courtroom of said Court, in the city of Tucson, State and District of Arizona, on May 13, 1920, at 9:30 A. M. Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

(Minute Entry.)

No. L.—219.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION,

Defendant.

Minutes of Court—May 13, 1920—Trial.

This case came on this day regularly for trial, the plaintiff appearing in person and with his counsel, L. Kearney, Esq., and James R. Dunseath, Esq., comes now the defendant, by its counsel, Clifton Mathews, Esq., John E. Sanders, Esq., and James S. Casey, Esq., and both parties announce they are ready for trial.

Eighteen jurors are then duly called according to law, by the clerk, and sworn to answer as to their qualifications, and examined by counsel; the jurors C. J. Barry and C. J. Johnson are challenged for cause by the plaintiff, which challenges are allowed by the Court, and said jurors are excused from this case, and jurors Wm. M. Pyle and Almond C. Walker are called in their stead and duly sworn by the clerk. The eighteen jurors now in the jury-box are found to be qualified, and thereupon counsel for respective parties each exercise right of three peremptory challenges and the remaining twelve jurors, to wit: Jas. C. Miller, F. J. Krevil, Tom Ligier, Jas. F. Edmonds, Wm. L. Harding, J. B. Murchison, J. S. Olmstead, Chas. Brassert, W. F. Willis, J. E. Beatty, Wm. M. Pyle, and Almond C. Walker, are called by the Clerk according to law, and duly sworn to try the issues joined herein.

Thereupon, James R. Dunseath, Esq., reads aloud the complaint [14] in this case and makes a statement to the jury on behalf of plaintiff, whereupon Clifton Matthews, Esq., reads defendant's answer herein to the jury.

Thereupon a Spanish interpreter is sworn at the request of the plaintiff, and John W. Walker is sworn as court reporter, at the request of the defendant. At the request of the plaintiff, the following witnesses were duly sworn and placed under the rule, and excluded from the courtroom during the trial of this case, to wit: Dr. H. W. Rice, J. P.

Hodgson, Maude L. Messing, Dr. J. B. Gray, Dr. D. M. Detweiler, and Dr. H. H. Stark.

The plaintiff, then, to maintain upon his part the issues herein, takes the stand as a witness in his own behalf, and is duly sworn, examined and cross-examined.

Thereupon the defendant moves the Court for an examination of the plaintiff's eyes by a physician to be selected by the Court, which request is agreed to by the plaintiff.

The plaintiff then, to further maintain upon his part the issues herein, calls as a witness Dr. Charles P. Dulin, who is duly sworn, examined and cross-examined. The plaintiff then rests his case.

Thereupon the defendant, for the purpose of maintaining on its part, the issues herein, calls as witnesses Dr. H. W. Rice, Maude L. Messing, J. P. Hodgson and Dr. J. B. Gray, each of whom in turn is duly sworn, examined and cross-examined. The plaintiff, Epifanio Guerrero, is then called for further examination.

The hour of adjournment having arrived, the said jury is excused by the Court from further attention until the 14th day of May, 1920, to which time the further hearing of this case is now ordered continued. [15]

At a regular term, to wit, the May, 1920, term of the District Court of the United States for the District of Arizona, held at the courtroom of said court in the city of Tucson, State and District of Arizona, on May 14, 1920, at 9:30 A. M. Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

(Minute Entry.)

No. L.—219.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION,

Defendant.

**Minutes of Court May 14, 1920—Trial
(Continued).**

The further trial of this cause having been continued from a previous session of this court, comes now all parties hereto and the further trial of this case continues as follows:

The defendant, for the purpose of further maintaining upon its part the issues herein, called Dr. D. W. Detweiler as a witness, and said witness is duly sworn, examined and cross-examined.

Thereupon it is stipulated by the parties to this action that the same questions asked at the examination of defendant's witness Dr. J. B. Gray may be considered as having been put to the defend-

ant's witness, Dr. D. W. Detweiler, with the same rulings and exceptions.

Dr. H. H. Stark is then called as a witness upon the behalf of the defendant, and is duly sworn and examined, and thereupon the defendant rests its case.

Thereupon Dr. B. F. Hartridge, a physician selected by the Court, upon application of the defendant, and with the consent of the plaintiff, is called as a witness, and being duly [16] sworn is first examined by the Court, and then by counsel for the plaintiff and defendant respectively.

Thereupon, there being no further testimony, this case is argued to the jury by respective counsel, after which the Court orally instructs the jury. The defendant then and there in open court duly excepts to the refusal of the Court to give certain instructions requested by the defendant. Thereupon the jury retires in charge of their bailiff, an officer of this court, first duly sworn for that purpose, to consider of their verdict.

And subsequently, said jury returns into court and their names are called, and all answer thereto respectively, and upon being asked if they have agreed upon a verdict, reply that they have, and thereupon present the following verdict:

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the above-named plaintiff Epifanio Guerrero and assess his damage in the sum of Twenty-seven Hundred Fifty (\$2,750.00) Dollars.

Thereupon, it is accordingly ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff do have and recover of and from the defendant the sum of Twenty-seven Hundred and Fifty Dollars, with his cost herein expended.

Thereupon the jury is discharged from this case.

Judgment.

This action came on regularly for trial on the 13th day of May, 1920, the plaintiff being represented by his attorneys, L. Kearney and James R. Dunseath, and the defendant being represented by its attorneys, Ellinwood & Ross, and Clifton Mathews. A jury of twelve men were regularly impanelled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence and argument of counsel and the [17] instructions of the Court, the jury retired to consider of their verdict, and subsequently, on the 14th of May, 1920, returned into court and being called answered to their names, and say that they find the verdict for the plaintiff and against the defendant in the sum of Twenty-seven Hundred Fifty (\$2,750.00) Dollars.

Now, therefore, by reason of the law and the premises aforesaid, it is ORDERED, ADJUDGED AND DECREED that the plaintiff, Epifanio Guerrero, do have and recover of and from the defendant, Phelps Dodge Corporation, a corporation, the sum of Twenty-seven Hundred Fifty (\$2,750.00) Dollars, with interest thereon at the rate of six

per centum per annum from date hereof until paid; together with the plaintiff's costs and disbursements incurred in this action, amounting to the sum of \$43.05, with like 6% interest thereon, until paid. [18]

In the District Court of the United States, for the
District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corpora-
tion,

Defendant.

Motion for New Trial.

Comes now the above-named defendant and moves the Court to set aside the verdict herein rendered and to grant defendant a new trial herein, for the following reasons:

I.

The Court erred in sustaining plaintiff's objection to defendant's cross-examination of plaintiff by which defendant proposed to show that the plaintiff's left eye was not in the condition plaintiff testified that it was, and that plaintiff did not state such to be its condition when he was examined by the defendant's witness, Dr. H. W. Rice. For this purpose the defendant propounded the following question and the following discussion ensued: [19]

Q. Did you tell Doctor Rice that you could not see in that eye when you went to him?

Mr. KEARNEY.—I object to that question as privileged.

The COURT.—Objection sustained on the ground it is a privileged communication, and it cannot be called for if the plaintiff objects to it.

Mr. MATHEWS.—This is not the time I expected to reach the question, your Honor, but perhaps it may as well be presented now as any other time. The plaintiff in this case, on the examination of his own counsel, has already voluntarily described not only his acts in point to Doctor Rice, but the treatment Doctor Rice administered to him. It has been given in this testimony on account of some water he says Doctor Rice put in his eyes being too strong. He says the doctor at Morenci, and afterwards identifies him as Doctor Rice. The record will show that he has testified voluntarily in answer to questions by his own counsel, not only that Doctor Rice treated him, but what the treatment consisted of; that he put water in his eyes that was too strong. While I recognize the rule that your Honor refers to, we submit that the door has been opened by counsel.

The COURT.—Well, frankly, I have the same views on the subject. In view of the fact that the evidence was called for by plaintiff's counsel, and I must confess that I don't know at this time whether calling for that evidence opens the door to your cross-examination as to verbal statements made or not. It would seem that if the plaintiff

calls for a part of what took place, that the defendant might be entitled to know all that took place. If the plaintiff had not told anything about the treatment that he received, or the fact that he was treated at all, but may have testified as to [20] the injury, and then called physicians and had them testify as to the result of the injury, that would be a different proposition, but they elected to go further than that, and to testify to the treatment, as to the character of the treatment that he received. It is an unusual situation, and it is an entirely new question, but I prefer, under the circumstances, to permit you gentlemen to look into the question and see whether or not you can find any authorities on the subject, and I will permit you to recall this witness for the purpose of again propounding that question to him, in the event it is held by the Court to be admissible, notwithstanding the fact that in the meantime they may have finished their testimony and closed their case.

Mr. MATHEWS.—For the present, the objection is sustained?

The COURT.—Yes.

Mr. MATHEWS.—May the record show our exception, your Honor?

The COURT.—Yes.

The aforesaid ruling constituted error for the reason that the Court thereby held that the plaintiff had not waived the privilege as to the communications between the defendant's witness, Dr. H. W. Rice, and the plaintiff and that the matter sought to be elicited was privileged. [21]

II.

The Court erred in sustaining plaintiff's objection to the testimony of the defendant's witness, Dr. H. W. Rice, by whom defendant proposed to show that the plaintiff's left eye was not injured as the plaintiff testified, and that the relation of physician and patient did not, in fact exist between the defendant's witness, Dr. H. W. Rice, and the plaintiff. For the purpose of eliciting this testimony, defendant propounded the following question and the following discussion ensued:

Q. When he first came to you on that afternoon in the latter part of January, 1919, complaining of the eye injury, when you first examined him, what did you find?

Mr. KEARNEY.—We object, it is a privileged communication.

Mr. DUNSEATH.—Privileged communication.

Mr. MATHEWS.—We have the same question that was presented a moment ago. I presume we will be permitted to present any authorities we may have in regard to the matter?

The COURT.—Yes, the plaintiff has permitted you without objection to go this far.

Mr. DUNSEATH.—I believe the only question was about seeing him and making an examination.
[22]

The COURT.—No, he has gone into the fact that he has treated him.

Mr. KEARNEY.—He does not testify to any treatment.

Mr. MATHEWS.—I would suggest that we do

not think this question is objectionable. It refers, not to an oral communication made by the plaintiff, but to something which the doctor himself found in the course of his examination and treatment, about which examination and treatment the plaintiff himself has testified voluntarily, going to the extent of telling in part what that treatment consisted of, and actually complaining before the jury of what the doctor did, criticising and finding fault with him, and we contend clearly that under that state of the record that plaintiff himself has swept away his privilege and opened the door to us to have the doctor give the whole thing rather than be confined to the one-sided statement of the plaintiff.

The COURT.—There is no doubt about this being a privileged communication, and the only question is whether you have or have not yourselves opened the door for the introduction of that testimony by going as far as you have in the examination of the plaintiff, and also in allowing, without objection, the examination of this witness up to the time when they called for the actual oral conversation between them.

Mr. DUNSEATH.—The examination of this doctor has not proceeded to any extent whatsoever that it becomes a waiver of the privilege. We could not consistently.

Discussion.

The COURT.—I will sustain the objection for the present. [23]

Mr. MATHEWS.—We will ask the record to show our exception.

The COURT.—You may have an exception.

The aforesaid ruling constituted error for the reason that the Court thereby held that the matter sought to be elicited was privileged, and that the privilege had neither been waived by the preceding examination of the defendant's witness, Dr. H. W. Rice, nor by the testimony of the plaintiff.

III.

The Court erred in sustaining plaintiff's objection to the testimony of the defendant's witness, Dr. J. B. Gray, by whom defendant proposed to show that the plaintiff's left eye was not injured as the plaintiff testified, and that the relation of physician and patient did not in fact exist between the defendant's witness, Dr. J. B. Gray, and the plaintiff. For the purpose of eliciting this testimony, defendant propounded the following question, and the following discussion ensued:

Q. What sort of an examination did you put the plaintiff through?

Mr. DUNSEATH.—We object to the question on the ground it is privileged.

The COURT.—Question sustained. [24]

Mr. MATHEWS.—I would like to be heard on that.

The COURT.—All right; I will withdraw the rule and allow you to be heard.

Mr. MATHEWS.—The point here is a new question, so far as I know, and it has not been raised previously in any other case in this court. We have here a situation where the relation of patient and physician within the meaning of the statute

does and did not exist. The situation is exactly similar to that which would exist where a prospective employee comes to a prospective employer and, under the rule, submits himself to a physical examination to enable the prospective employer to know whether he is physically fit to work; that that is the sole purpose of the examination. Not being that of medical treatment, but to secure information for the employer for his use in determining this very fact. That is frequently the case, and I recall one instance at least where such testimony was permitted in this court, the testimony of a physical examination, upon application for employment. The theory of it is that there is no relation of physician and patient in the ordinary sense. But the situation is one where a person who is examined voluntarily submits himself to a physician in order to enable the third person to know something of the condition, which he otherwise would not be able to ascertain for himself. We have here precisely the same sort of situation. The purpose may be a different purpose, but the situation, so far as I can see any legal distinction, is similar. We have here a man who has been an employee and has received or claimed to have received an injury, and he is negotiating [25] with his employer seeking some sort of a settlement, and the employer desires to know what the true condition of that man is for his own information and guidance in making a settlement or refusing such a settlement, and that purpose, if fully explained to the employee, the person supposed to be injured, and the arrangement has

been made by mutual consent between the employee and the employer whereby a physician may be used, and that with the understanding that the information obtained by the physician shall be communicated to the employer; made known to him for the very purpose of possible settlement or possible negotiations. Now, if there is any element of confidence to that, it does not occur to me. It is not the relation of patient and physician any more than he was able to go to some other place and have this examination made. Suppose he went to some physical director or some athletic trainer and said, "I want you to measure me for such and such a thing; I want you to determine certain things about my body and my size, etc., because another man wants it, and I want him to have it, and I am willing that he should have it." There would be absolutely no relation of physician and patient as ordinarily understood. It just happens in this case that the person who is able to get this information, and who both parties desire to go and get the information is a physician. His ability depends upon the fact that he has expert medical knowledge, and the testimony of Mr. Hodgson, coupled with the testimony already given by Dr. Gray shows absolutely no relation of physician and patient existed in this case. The privilege never existed, and it could not have been intended to have existed. I think that the privilege is waived, if one ever existed, when I say, "All right, I will go to a doctor and let him examine my eye," [26] "or anything else about me; I will let him examine me with reference to an in-

jury or supposed injury for the purpose of enabling you to know those things about me which you are now not thoroughly satisfied about." Now, if there is going to be a question of privilege raised, certainly I waive that privilege when I give that consent. I think the true theory of it was that the relation of patient and physician never existed. There was no understanding that there was to be any treatment in this case. As to the other physician, Doctor Martin, Mr. Hodgson testified he sent him there for examination and possible treatment. Not so here in this case. It was solely a matter of obtaining information about this man. He might have said, "No, I will not submit to it. I will let you find out the best way you can," but he says, "All right, I will go." He did not take advantage of that. He says, "If you will pay the expenses, arrange for some doctor specialist in this line, give me the money to go down there, I will go and submit myself so that you may have the information which you have not now, and then, perhaps, we will be able to arrive at some settlement or something. You will have the facts more to your satisfaction." I can't see that the confidential relation or possible privilege could grow out of that.

The COURT.—I think the Court should know whether there was such a relation at the time, and I suppose that it would only be fair to the defendant for the plaintiff to testify as to his understanding, whether he did so agree before ruling on that.

Mr. KEARNEY.—Shall we put the plaintiff on the stand and examine him a little bit? [27]

The COURT.—I think so.

EPIFANIO GUERRERO, being recalled by counsel for the plaintiff by permission of the Court, and having been heretofore duly sworn, through the interpreter, testified as follows:

Direct Examination by Mr. KEARNEY.

Q. When you went to El Paso, what did you understand you were going there for? Did you understand that you were going there to have your eye treated?

Mr. MATHEWS.—Your Honor, we object to that.

The COURT.—The first part of the question is perfectly proper, I think, but the latter part of it is objectionable. His understanding of what he was going there for is proper.

Q. What did you understand you were being sent to El Paso for?

A. To benefit my eye; it would do my eye some good.

Q. Did you believe, when you went there, that you were to receive treatment for your eye, or try to better your eye or not?

A. Yes, sir; with that intention.

Q. You went there for the purpose of receiving some benefit to your eye?

A. Yes, sir; most assuredly. How would I be in this fix?

Q. Did you pay hospital fees when you worked for the company? A. Yes, sir.

Q. And that goes to help keep up the hospital by the doctors there?

The COURT.—I want to know if there was any

understanding between this witness and any other officer of the company at the time he left. [28]

Mr. KEARNEY.—He says now, to get a better eye.

The COURT.—You may cross-examine him, if you so desire.

Cross-examination by Mr. MATHEWS.

Q. You only stayed in El Paso one day, I believe, you testified?

A. The day that I left, the doctor sent me to El Paso, and I got there at two-forty, and I went to the doctor right away, and I left there the next day.

Q. They did nothing to you but examine you, did they? A. That is all.

Q. You came back as soon as he examined you?

A. Yes, sir; sure, I was going down on some business.

Mr. MATHEWS.—No further cross-examination.

Redirect Examination by Mr. KEARNEY.

Q. Did you believe that the doctor that you saw at El Paso was acting with the doctors at Morenci?

Mr. MATHEWS.—That is objected to on the ground it is irrelevant. What this man believed since, founded upon some unreasonable ground, is not competent. He may believe anything. The true situation here is whether or not this arrangement that Mr. Hodgson has sworn to occurred here. That has not been contradicted so far by anybody.

The COURT.—I will ask him myself.

Examination by the COURT.

Q. What, if any, conversation, did you have with

Mr. Hodgson, the gentleman who just testified here, with reference to your going to El Paso?

A. Nothing. [29]

Q. Did, or did he not, request—did you not request of him or the company a settlement for the injury to your eye? A. Yes, sir.

Q. Did he or did he not tell you that if you would go to El Paso to be examined by a specialist, an eye specialist, and that specialist made a report to the effect that you had such an injury, that he would settle with you?

A. No, sir; he did not tell me anything.

Q. Did you have any conversation with him to the effect that you would go down there and be examined, have your eye examined by the El Paso specialist, and that if that surgeon should be permitted to make report to him as to the condition in which he found your eye?

A. No, sir; I have never been to El Paso after that.

Q. After what?

The INTERPRETER.—I will ask that question again.

The COURT.—All right.

The WITNESS.—No, sir.

Q. Was it your purpose, and the purpose of the company's officer to obtain a report from the specialist in El Paso in order to enable him to determine whether or not he would settle with you for the injury to your eye?

A. Of the company, do you mean?

Q. Yes.

A. He only examined my eye, but he never told me anything.

Q. Was it agreed between you and Mr. Hodgson before you left Morencos that you should go down to El Paso and have your eyes examined and that that specialist should make a report to him, and if the report showed an injury, that he would settle with you for the injury? [30]

A. No, sir; he didn't tell me nothing.

Witness excused.

The COURT.—Well, the evidence in that matter being evenly balanced, I feel that I ought to sustain the objection.

Mr. MATHEWS.—This is a little unusual, your Honor. I take it that this testimony that the plaintiff has given at this point is positively rebuttal. It is not part of his main case.

The COURT.—No, it is preliminary, to enable the Court to determine whether or not this testimony should be admitted, or whether it should be excluded because it is privileged.

Mr. MATHEWS.—I understand perfectly what it is for, but that is the way in which these things should come. The plaintiff puts in his case, and at least, the defendant has made a *prima facie* case, or showing here, and a very strong one, that a certain state of facts existed which would take this case entirely out of the privileged communications. Now, in rebuttal—it does not matter when it happened—the plaintiff is permitted out of order, to meet that *prima facie* showing and endeavor to overcome it.

The COURT.—Only for the purpose of enabling the Court to determine whether the doctors' evidence is privileged.

Mr. MATHEWS.—The plaintiff testified that he never knew that such a man as Hodgson existed, and naturally he would say he never had any such a conversation with him, but when we make this showing, we are entitled to put the testimony in on the face of this *prima facie* showing, and then if the plaintiff wants to attack this *prima facie* showing, he does it on rebuttal, and then after [31] the showing is presented, the whole thing, under proper instructions, goes to the jury. But to say that while the *prima facie* showing that we have made here, and then right in the middle of the trial allow the plaintiff to come in and attack that, without letting us go through with our testimony, and then say because the testimony is conflicting, and in the opinion of the Court evenly balanced, that the rule should be made against the defendant, and the defendant will not be permitted to put the testimony in at all, seems to me rather hard.

The COURT.—Maybe you are right.

Mr. MATHEWS.—It strikes me—I don't want to bring in something here for the purpose of making an error, but it strikes me—it seems to me clear that it is like many, many other situations where *prima facie* showing are to be made first. That does not mean that it is final. It may be overcome later by the rebuttal, but if we make a *prima facie* showing, and put this in proper form, and then like

anything else, or other situations, it is simply a matter for the jury, under the proper instructions from the Court what to do with this, in case they believe such and such a thing, and disregard it if they do not believe such and such a thing, and not a matter to be finally determined by the Court in its finding.

The COURT.—You object to it?

Mr. KEARNEY.—I object to it on the ground that it is privileged.

The COURT.—I sustain the objection.

Mr. MATHEWS.—We ask that our exception be entered.

The COURT.—You may have an exception. [32]

The aforesaid ruling of the Court constituted error for the reason that the Court thereby held:

(a) That the matter sought to be elicited was privileged.

(b) That the relation of physician and patient existed between the defendant's witness, Dr. J. B. Gray, and the plaintiff,

(c) That the burden of proving that such relation did not exist was on the defendant.

The Court erred in said ruling:

(d) In changing the order of proof and holding that the examination of plaintiff as to the relation between the plaintiff and the defendant's witness, Dr. J. B. Gray, was a part of plaintiff's case in chief and not rebuttal.

(e) In passing on a question of fact and taking it from the jury.

(f) In weighing the evidence and determining the credibility of witnesses.

(g) In holding the evidence to be evenly balanced on the question presented.

(h) In excluding the testimony offered after holding that the evidence was evenly balanced.

(i) In excluding the evidence offered after defendant had made a *prima facie* showing that the relation of physician and patient did not in fact exist between the defendant's witness, Dr. J. B. Gray, [33] and the plaintiff.

(j) In holding the question presented to be one of admissibility or competency and not of weight or credibility.

(k) In, in effect, depriving defendant of its entire defense by changing the order of proof and placing the burden of proof on defendant.

IV.

The Court erred in sustaining plaintiff's objection to the testimony of the defendant's witness, Dr. J. B. Gray, by whom defendant proposed to show that the plaintiff's left eye was not injured as the plaintiff testified, and that the relation of physician and patient did not in fact exist between the defendant's witness, Dr. J. B. Gray, and the plaintiff. For the purpose of eliciting this testimony, defendant propounded the following questions and the following discussion ensued:

Q. What part of the examination did you conduct, and what part did Dr. Detweiler conduct?

Mr. KEARNEY.—We object to that; it is privileged to him.

The COURT.—Sustained.

Mr. MATHEWS.—The defendant desires an exception.

The COURT.—Exception. [34]

Q. Now, what—I will ask you this, and you need not be in a hurry to answer it, because the counsel on the other side will object. I don't want to waste time, your Honor.

The COURT.—You may ask the question.

Q. You need not be in a hurry with your reply, Doctor. Did you and Doctor Detweiler, or either of you, on this occasion make a test of the plaintiff to ascertain whether or not he really was blind in his left eye?

Mr. KEARNEY.—I object to that on the ground it is privileged.

The COURT.—I sustain the objection.

Mr. MATHEWS.—The defendant excepts.

Q. Now, one more question along that line, slightly different, your Honor. Did you and Doctor Detweiler or either of you on that occasion apply the scientific tests for the purpose of ascertaining whether or not the plaintiff's left eye was normal or abnormal?

Mr. KEARNEY.—We object to that question on the same ground.

The COURT.—Same ruling.

Mr. MATHEWS.—Same exception, Mr. Reporter.

Q. And on the same occasion did you also make an examination of the plaintiff's right eye?

Mr. KEARNEY.—I object to that on the same ground.

The COURT.—Same ruling.

Mr. MATHEWS.—Same exception. We have no further examination. Just one [35] more question.

Q. As a result of that whole examination made by yourself and Doctor Detweiler, did you reach a conclusion as to the condition of the plaintiff's eyes?

Mr. KEARNEY.—I object to that on the same ground.

The COURT.—Sustained.

Mr. MATHEWS.—Exception.

The aforesaid ruling of the Court constituted error, because the Court thereby held that the matter sought to be elicited was privileged and that the relation of physician and patient existed between the defendant's witness, Dr. J. B. Gray, and the plaintiff.

V.

The Court erred in refusing and failing to give the following instruction to the jury as requested by defendant:

Gentlemen of the Jury, the law of this State permits the plaintiff in a case of this kind to object to the testimony of any physician who may have examined or treated him, as to what he told such physician about his ailments, or as to what the physician himself discovered by his examination of the plaintiff. The law does not require the plaintiff to make any such objection, but leaves him free to make it or not make it, as he sees fit. If he does make the objection, the Court is required to sus-

tain it. In this case, the testimony of certain physicians has been offered by the defendant corporation, and has been objected to by the plaintiff, and [36] this testimony has been excluded, not because the Court was unwilling to admit it, but simply because the plaintiff objected to it, and the Court, under the law, was required to sustain the objection. The fact that the plaintiff has made this objection, and has thereby kept these physicians from testifying, is a fact to be considered by you in weighing the plaintiff's own testimony, and in judging of the truth of the story he tells.

ELLINWOOD & ROSS,
JOHN E. SANDERS,
JAMES S. CASEY,
Attorneys for Defendant. [37]

State of Arizona,
County of Cochise,—ss.

James S. Casey, being sworn, says that he is one of the attorneys for the defendant named in the foregoing motion; that as such attorney, and acting for and on behalf of said defendant, he served said motion on L. Kearney, Esquire, attorney for the plaintiff named in said motion, by depositing a true copy of said motion in the Postoffice at Bisbee, Arizona, addressed to said attorney for said plaintiff, at his place of residence, to wit, Clifton, Arizona, with postage fully paid thereon on the 14th day of June, A. D. 1920.

JAMES S. CASEY.

Subscribed and sworn to before me this 14th day of June, A. D. 1920.

[Seal]

JEAN BOYD,
Notary Public.

My commission expires February 26, 1924.

[Endorsements]: Epifanio Guerrero, Plaintiff, vs. Phelps Dodge Corporation, a Corporation, Defendant. Motion for New Trial. Filed June 16, 1920. C. R. McFall, Clerk. By J. Lee Baker, Chief Deputy Clerk. [38]

At a regular term, to wit, the May, 1920, term of the District Court of the United States for the District of Arizona, held at the courtroom of said Court, in the city of Tucson, State and District of Arizona, on June 24, 1920, at 9:30 A. M. Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

(Minute Entry.)

No. L.—219.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION,

Defendant.

**Minutes of Court—June 24, 1920—Order Denying
Motion for New Trial.**

Defendant's motion for a new trial herein hav-

ing been heretofore submitted to the Court and taken under advisement, and the Court having fully considered the same, does now order that the said motion for a new trial be, and the same is, hereby denied, to which ruling on the part of the Court the defendant duly excepts. [39]

In the District Court of the United States for the
District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corpo-
ration,

Defendant.

Bill of Exceptions.

Be it remembered that on the trial of this cause in this court, at the May, 1920, term of said court, at Tucson, Arizona, before the Honorable William H. Sawtelle, United States District Judge, plaintiff appearing in person, and by his counsel, L. Kearney, Esquire, and James Dunseath, Esquire, and defendant appearing by its counsel, Clifton Mathews, Esquire, John E. Sanders, Esquire, and James S. Casey, Esquire, the following proceedings were had, to wit:

A jury was called, empanelled and sworn according to law and thereupon plaintiff, to sustain the issues on his part, offered and introduced the following testimony. [40]

Testimony of Epifanio Guerrero, on His Own Behalf.

EPIFANIO GUERRERO, plaintiff, being first duly sworn through James Hunter, interpreter, testified as follows:

Direct Examination by Mr. KEARNEY.

My name is Epifanio Guerrero. I live in Morenci. I came there in 1917. My family lives there. I have had experience as a miner since I was fourteen years old and have worked in Mexico. I have worked in Morenci as a miner for about a year for the Morenci Company, the defendant in this case.

On January the twentieth of last year, the time I got injured, I was working for the defendant company. I was a miner in the London Mine. We were digging out ore and one of them big rocks fell down and I hit it with an eight-pound sledge hammer and when I hit it, one of them pieces broke off and hit me in the eye. That was at eleven o'clock in the morning during my shift. That was part of my—my part of my business, to break the great big rocks, and when the miners had to use the blast to break the big rocks and I broke the little rock.

The foreman for the defendant company told me to break those rocks with a sledge-hammer. [41] We put it in a wheelbarrow and we hauled it from there to the chute, where it was carried away in the car. This was done in the mine where they dug a tunnel on one side, and the other, and there is where we were breaking that rock and hauling it over to

(Testimony of Epifanio Guerrero.)

the cars. Where we were working I think it was about one hundred and fifty feet underground, kind of an incline. I was working down in the mine, in the ground at the time I got injured. There was only two partners of us working together in the tunnel, no more. My partner was on one side, one square of the lumber, and I was on the other square of the lumber myself. What I mean by a square is some lumber fixed up there in the tunnel so that the ore will not come down on you, and that stope, when you are working in a stope, and whenever you come across to a place where there is danger, you put that lumber right there and protect the rock or ore from coming down on you. I don't know where this person is that was working with me. When they stopped the work where I was working, he stopped him from work and he went away. He was also deaf besides; the man that was working with me was deaf.

When I got my injury, when we went up at noon to dinner, I reported it to the foreman. I told him that I was going to the doctor, that I received a blow in my eye, and he said, "All right," and he also told me to go to a doctor. [42]

I went to the doctor to treat me on the twentieth of January, 1919. The doctor treated me at that time. This was in Morenci. I used to go to the doctor about every other day. I went to him for eight days and then he put some kind of a water that was too strong in my eye, or something, and from there they sent me to Phoenix. The doctor boss

(Testimony of Epifanio Guerrero.)

foreman sent me to Phoenix. They gave me a letter to take to the doctor. I found the doctor at Phoenix. That doctor only examined my eyesight and that is all. I stayed there one day. He sent me back to Morenci again. He did not give me a letter to take back to Morenci.

When I came back from Phoenix, they put me in the hospital twenty-five days. After they had me there at Morenci there in the hospital twenty-five days and treated me twenty-five days, they sent me to the—the boss doctor there at Morenci sent me to El Paso again to another doctor in El Paso. He gave me a letter to the doctor in El Paso. I also found him. I only stayed there one day also. The doctor in El Paso he also examined me and that is all he done to me. They did not give me any letter; they just sent me back to Morenci. I went back to Morenci. They did not treat me. I used to go over to the doctor at Morenci and put some drops in my eye; that is all he did. He didn't give me any treatment. [43]

Q. Tell him I don't want him to tell at this time what the doctors told him or what he told the doctors.

Mr. MATHEWS.—I think this examination ought to be conducted in the ordinary way.

The COURT.—It is a question whether you have not already relieved the plaintiff of the privilege by asking him to tell what the doctors did for him.

Mr. KEARNEY.—No, the statute says the doctor cannot testify without the consent of the patient.

(Testimony of Epifanio Guerrero.)

The COURT.—You have put in evidence that the man went to the doctors and was treated and it would seem to me that you have waived the privilege by asking him how the doctors treated him.

Mr. KEARNEY.—I understand that that is not a privileged communication.

The COURT.—That is to be passed on. I am just cautioning you, that it looks like you are getting very close to the line.

This injury gave me pain and also drew a little blood. All the time I was treated in the hospital I had pain and I have pain still. It has not left my eye. [44]

Q. And do you have any vision now in your left eye, A. No, sir.

Before I went to work for the defendant company, there was no physical examination. Before the twentieth of January of last year, I was well in my eyesight. When I went to work my eyesight was all good. At the time of my injury the company paid me four-thirty for seven hours and a half work. When the company at Morenci work on Sundays, I work on Sundays, and when they did not work on Sundays, I did not work on Sundays. I laid off only when I got sick of cough and sometimes I would take cold and I would have to lay off during the time, too. Most of the time I was working. During the time I got sick with influenza nine days, and I laid off those nine days. When I was working for the defendant, I would sometimes lay off. I can't say I was always at

(Testimony of Epifanio Guerrero.)

work. Sometimes I work, sometimes I did not. As a rule I laid off three days or five days a month. Up to the time of my injury, I was well. My health was good; I was well all the time.

I don't drink. I don't like liquor. I could see out of my left eye before the twentieth of January of last year. When I went to work out there my eyesight was good. When I went to work [45] in the mines at Morenci, I was in good health. I have been injured about fifteen months and I have not worked one day. I haven't worked because I can't work; I can't see; I am not capable of working. I am thirty-five years old. When I was injured, I was right at thirty-three years old and I have been in this about two years, so that will make thirty-five.

Cross-examination by Mr. MATHEWS.

I said I came to Morenci in 1917, in February. Before I came to Morenci I was living in Mexico. I came from Mexico. I had never come to the United States before. I am not miner; I am a mucker as you call it, a mucker. As I said before, in Mexico I was a miner all the time, but when you come here to the United States, they put you, as they call, a resagador. That is what I was working at at the time. In Morenci I never was a miner; always a mucker. In Mexico miners and muckers are not the same thing. They call him muckers here, and also in Mexico they are muckers, and muckers in Mexico are just the same as they are here in the United States.

(Testimony of Epifanio Guerrero.)

I don't know the name of the man who was working with me. The man was there and he was [46] working in another place and the boss put him to work and put me to work where I was working at that time. He could see me and I also told him I got injured, but he could not understand me because he could not hear and he only shook his head. Yes, he saw me. He was working right at that square and I was on the other one and he saw the rock when it hit me in the eye, and I says to him: "I hurt my eye with that rock," and he looked at me and just shook his head.

The piece of rock that hit me in the eye was about that big (indicating). When it struck me they have a strong blow. That was a piece of ore rock. When you strike that and they split off they go very fast. This rock was about three or four inches long. They are heavy; the ore was very heavy. Some little pieces would weigh big, weigh half a pound. There are very small rocks like that that may weigh a whole lot if it is first-class ore, black ore.

The rock that I was striking was first-class ore. It hit me right in the eye. It remained there in the ore in the pile. Nobody could pick it up. That was about eleven o'clock in the morning. I told the foreman when we went out to get dinner. When they took us up to get dinner the foreman was sitting up there on some lumber and I went to him and I told him I was going to the doctor, I had been injured, and he said, "All right." [47]

(Testimony of Epifanio Guerrero.)

We usually came out, bring us up lacking ten minutes of the time for dinner. When they call you and give you ten minutes' time to get out and when you get out it is twelve o'clock and you get up to your dinner. Well, lacking ten minutes of the time for us to get out, it was about one hour after I was hurt. We were still working at that time. From the time I got my eye hurt until I went out to lunch I kept on working, and at that time when we went out I reported to the foreman; they call him Jean, but I think his name is Santiago. He is still foreman at Morenci. He is around the Arizona there somewhere. I don't know whether he is still at Morenci or not. Yes, sir, he told me to go to the doctor because I told him I was going to see the doctor and he says, "All right, go and see the doctor." I went to see the doctor right away and then he treated me and put a bandage around my eye. That was Dr. Rice, I think they call him. He was one of the doctors at Morenci.

Q. You stated in answer to your attorney's question this morning, you stated that he put some water in your eyes that was too strong. Do you know the name of that water?

A. I don't know what medicine he treated me with. They knew what medicine they used; I didn't. [48]

Q. What day was it he put this strong medicine in your eye, the first day or some later day?

A. He says he treated him for some days with some black medicine that he put in my eye, and one

(Testimony of Epifanio Guerrero.)

of those days he went over there and he dipped a little piece of stick and a little cotton on the end of that stick, and he put it in a bottle, and when he come out with it it smoked like, and when he put it in my eye, it burned like everything. It was pretty strong for my eye.

Q. Was that the first day that you went to him?

A. No, sir; after he had been treating me he put that water on me.

The head doctor, kind of a blond fellow, sent me to Phoenix. I don't know his name, the foreman doctor. It was the man that was supposed to have charge of all the other doctors or officers around there. He was supposed to be over all the other doctors at the company hospital. He was the boss. I don't know if the name of the doctor at Phoenix was Doctor Martin. They know what doctors their names was; I don't know any of the doctors. The doctor did not tell me his name either. I didn't know the names of the doctors that they have sent me to. I found this doctor because the Mexican man told me, told me the building where the doctor was, and I went over there [49] to the building and he says, "You go up there and you will find the doctor." And the man in the elevator, I showed him the letter I had with the doctor's name and he showed me the doctor's office. I could not read the name; I don't know how to read. I can't read or write.

I stayed in Phoenix only one day. This Phoenix doctor did not treat me, he only put some drops and

(Testimony of Epifanio Guerrero.)

examined my eye and that is all he done to me. I have not seen him in the courtroom. If I would see him I would not know him. I have not brought him here as a witness.

As soon as I returned from Phoenix I was sent to the hospital; I think I was in the hospital during February. There was a nurse there that treated me there. There was one head nurse and another one that treated me. The head nurse looked after me. I don't know what her name was. I stayed there twenty-five days, but I didn't find out the nurse's name.

The same doctor sent me to El Paso, that blond doctor that I said before had sent me to Phoenix. I don't know his name.

Q. Do you know Captain Hodgson, the manager of the defendant corporation at Morenci?

A. He says they have a captain and also another one and I don't know which one of the captains it was. [50]

I do not know Mr. Hodgson, the manager of the company at Morenci. The doctor that sent me to Phoenix was the one that sent me to El Paso. He gave me a letter to both places. I don't know the name of the doctor I saw in El Paso. I only saw the one that they sent me to. I didn't know his name then. I found him because I went to the building there and I went to the elevator boy, the man that handled the elevator, and I showed him that letter and he told me to go upstairs, that the doctor was up there, and I went up there. I know

(Testimony of Epifanio Guerrero.)

what building because they told me. Most anyone would tell me. The letter that I had the doctor's address was addressed on the envelope, and someone that spoke English told me that the building was over there.

Only one doctor examined me there. He examined me two times. I went home right away. I never went to El Paso again. I only made one trip to El Paso. I do not know Dr. Gray in El Paso. I know Dr. J. B. Gray in El Paso. I know Dr. D. W. Detweiler. I do not know Dr. H. H. Starke in El Paso. Neither one of those doctors examined me. The only one that examined me was the one they sent me to. I don't know his name. I only made one trip to El Paso. [51]

My left eye does not burn. My left eye is blind; I can't see with it. I was drawing \$4.30 per day as a mucker. The kind of cough I had when I laid off was a natural cough. You will get a natural cough once in a while. I don't suffer from coughs. I had a cough when I laid off. I had influenza for nine days. I don't remember when. It was before this accident in Morenci. I laid off during that time.

I have not done one day's work since my eye was hurt. I still live at Morenci. I can't see out of the left eye. I don't work because I am not able to work. That is not the reason I am unable to work. I am unable to work since I was injured because of my eyesight. I am short of my sight in my eye; that is the reason I don't work.

Q. Are you willing to submit yourself to an ex-

(Testimony of Epifanio Guerrero.)

amination by physicians to be appointed by this Court to examine your eye and report to the Court and the jury the true condition of your eyesight at this time?

A. He says, "I have been examined; what more examination do you want?"

Q. Are you willing to submit to the kind of examination I mention?

A. He says, "I have been suffering; no, sir; I have been suffering so long, what is the use of having that examination?" [52]

Q. Then you don't want to be examined any more? A. No, sir.

Mr. MATHEWS.—Your Honor, we now inquire of counsel for the plaintiff if they, as his attorney, are willing to submit him to examination by impartial physicians to be appointed by this Court and test his eyesight, and report to the Court whether or not it is true he can't see.

Mr. KEARNEY.—We have no objection to submit.

Mr. DUNSEATH.—If this man is not suffering from an injury we want to know it.

Mr. KEARNEY.—If you will appoint some fair person. We are perfectly willing.

Mr. DUNSEATH.—If this man is not entitled to recover for pain and suffering, now we don't want to recover.

The COURT.—The Court will select an impartial physician if there be one to be found in town and

(Testimony of Epifanio Guerrero.)

have them examine him, but we won't delay the trial now for that purpose.

Mr. MATHEWS.—I have no further cross-examination.

Redirect Examination by Mr. KEARNEY.

Q. There is a question I desire to ask— [53]

Mr. KEARNEY.—You admit that he is a citizen of Mexico and born there?

Mr. MATHEWS.—Yes, there is no use of proving that.

Redirect Examination by Mr. DUNSEATH.

I think the letter which I had when I went to El Paso and that I testified I showed to the elevator boy had the doctor's name on it. I showed the elevator boy the letter. When I showed him the letter he only says, "Over there; it is over in that building." He didn't take me there. After I showed him the letter he showed me where the office was.

The cough I had was just a little cough, just a natural cough. The cough I had was a little cough; it passed away right away.

When I came back from El Paso they put some drops in my eye and after that they did not treat me any more. I don't remember how much time there was between the time I got the accident and the last treatment, but it was in the month of March.

Recross-examination by Mr. MATHEWS.

My left eye first became blind the same time as

(Testimony of Epifanio Guerrero.)

that injury. I have been blind in that eye ever since that rock struck me. Yes, I was injured in that eye when I first went to Doctor Rice. [54]

Q. Did you tell Doctor Rice that you could not see in that eye when you went to him?

Mr. KEARNEY.—I object to that question as privileged.

The COURT.—Objection sustained on the ground it is a privileged communication, and it cannot be called for if the plaintiff objects to it.

Mr. MATHEWS.—This is not the time I expected to reach the question, your Honor, but perhaps it may as well be presented now as any other time. The plaintiff in this case, on the examination of his own counsel has already voluntarily described not only his acts in going to Doctor Rice, but the treatment Doctor Rice administered to him. It has been given in this testimony, on account of some water he says Doctor Rice put in his eyes being too strong. He says the doctor at Morenci, and afterwards identifies him as Doctor Rice. The record will show that he has testified voluntarily in answer to questions by his own counsel, not only that Doctor Rice treated him, but what the treatment consisted of; that he put water in his eyes that was too strong. While I recognize the rule that your Honor refers to, we submit that the door has been opened by counsel.

The COURT.—Well, frankly, I have the same views on the subject. In view of the fact that the evidence was called for by plaintiff's counsel, and

(Testimony of Epifanio Guerrero.)

I must confess that I don't know at this time whether [55] calling for that evidence opens the door to your cross-examination as to verbal statements made or not. It would seem that if the plaintiff calls for a part of what took place, that the defendant might be entitled to know all that took place. If the plaintiff had not told anything about the treatment that he received, or the fact that he was treated at all, but may have testified as to the injury, and then called physicians and had them testify as to the result of the injury, that would be a different proposition, but they elected to go further than that, and to testify to the treatment, as to the character of the treatment that he received. It is an unusual situation, and it is an entirely new question, but I prefer, under the circumstances, to permit you gentlemen to look into the question and see whether or not you can find any authorities on the subject, and I will permit you to recall this witness for the purpose of again propounding that question to him, in the event it is held by the Court to be admissible, notwithstanding the fact that in the meantime they may have finished their testimony and closed their case.

Mr. MATHEWS.—For the present, the objection is sustained.

The COURT.—Yes. [56]

Mr. MATHEWS.—May the record show our exception, your Honor.

The COURT.—Yes.

(Testimony of Charles P. Dulin.)

Mr. MATHEWS.—That is all the cross-examination I have, your Honor.

Witness excused.

Testimony of Charles P. Dulin, for Plaintiff.

CHARLES P. DULIN, witness for plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. KEARNEY.

My name is Charles P. Dulin. I live in Tucson. I am a physician, limiting my practice to the eye, ear, nose and throat. I graduated in medicine in 1893, St. Louis, Missouri, St. Louis College for Physicians and Surgeons, and since that I have graduated at the army medical school in 1905 and been engaged in the practice privately and in the United States Army since. I was the contract surgeon and lieutenant and captain in the Medical Reserve Corps. From 1905, 1906, as a contract surgeon for about a year and a half or two years and then became a First Lieutenant and was put on the inactive list about 1913 for physical disability and when the present—when the last war broke out, I was recalled for active duty. I was on active duty for six months in 1917 and ended in January, 1918.

[57]

I commenced practice here in February, 1918, I was licensed in 1907 in Arizona. I limit my practice to the eye, ear, nose and throat. Since I have been in Tucson I have done nothing else. In the army, as near as possible, my practice was limited

(Testimony of Charles P. Dulin.)

to that, although it is impossible to limit it to any one subject entirely. A man is liable for any kind of service if you understand the condition, but wherever it was extensive enough, as, for instance, in 1918, I was head of the Eye Clinic at the base hospital at Vancouver Barracks, Washington, for the six months I was there, and at various other posts when there were sufficient medical officers. At garrison, I was usually called upon to handle all branches of the service in addition to other work.

I have seen the plaintiff in this case. He came into my office for an examination last Sunday morning. I believe that you were with him, at least you were there shortly afterwards. I am not certain that you brought him in. I was requested by you or Mr. Dunseath, to make an examination of his eye, which I did. His left eye, the clear part of it, on the reflection of a beam of light over the sight shows a smoke condition similar to that which you see when you hold a piece of smoked glass to the light. The outer surface of the same clear part of the eye is roughened, and irregular, and outside of that the physical condition is normal. [58] The vision of that eye undoubtedly is low, probably so low as to render vision impossible. That is, by vision, I mean, the accurate seeing of objects, but undoubtedly can differentiate light from darkness. That would be about as much as I would be willing to say positively he could do. It might have been caused by a traumatic injury, it might. By foreign substance falling into the eye, it might.

(Testimony of Charles P. Dulin.)

Cross-examination by Mr. MATHEWS.

I examined the plaintiff just once. It was last Sunday morning at my office. No other physician took part in the examination. There was an interpreter present; I don't know his name. I am not certain but what he was the Mexican Consul. I talked with the plaintiff through an interpreter at that time. His attorneys, Mr. Kearney and Mr. Dunseath, were both present. I believe I remember that Dr. Clyne was in the office for a moment, but not long enough to be said that he was present during the examination. He did not stay through the examination nor take any part in it. I examined the one eye. It was the left eye.

The examination was first made, the first portion of the examination was merely an observation as to the condition of the eye and then I used an ophthalmoscope to look into each eye, and then I used a pencil of light in a darkened room to observe the condition of [59] the inner part of the eye behind the clear part, you understand, and then I used an ophthalmometer to measure the cornea, or clear part of the eye, measured the outer surface for irregularities. That constituted the examination. This outer surface that was roughened, that was the outer surface of the clear part of the eye; that is, not the part sometimes spoken of as the white of the eye. I don't think you would call that the white of the eye. The white of the eye is the rest of the eyeball that this part is set in. This is the crystal part that is set in the eyeball.

(Testimony of Charles P. Dulin.)

That was where I found this roughness or irregular surface. It would be very hard to tell what the cause of that was. The patient did not give me a great deal of history on account of the fact that the gentleman did not seem to speak English. I got what was necessary. I didn't try to get a history of the case because it did not seem to be the point I was examining for, which was the present condition. There was no object in learning the history.

This roughness seemed to be distributed over the entire surface. It covers the pupil and also the clear part of the eye. I can't say that it was more noticeable in one part than another. The examination that reflected images on there, those are distorted. It shows that the image on the smooth surface, those images are reflected without any distortion whatever, they are reflected in exactly the [60] same shape. This distortion occurred practically over the entire clear part of the eye, consequently, I could see no part that was—there was practically no difference. You could get a better idea if you took some of those headlight lenses that automobiles have that are intended to diffuse the light. The surface covers that diffusion of light. There was no regular system on this roughened surface. It seemed to be the result possibly, I might say, from the formation of scar tissue; that was one of the things I observed when I applied light in the various ways I applied it.

(Testimony of Charles P. Dulin.)

The ophthalmometer is an instrument designed to measure the clear part of the eye or cornea, for the purpose of supplying the patient with glasses in case of an irregularity in it, which it is possible to correct. The ophthalmoscope is an instrument for looking inside of the eye. It is to look into the eye with. You can see both the front cavity and the back cavity or partition in the eye ball by this means. By means of a narrow ray of light reflected on a mirror through the pupil of the eye. I used an ophthalmoscope and I used the ray of light that reflected into the eye. I used that at the side of the eye to extend this small pencil of light across laterally through the clear part of the eye. Naturally, I also examined the eye as thoroughly as I could [61] with the naked eye before I began any of this mechanical examination.

Q. Now, there are various ways in which vision can be measured and set down or described in figures indicating the ratio of perfect vision, are there, Doctor? A. There are.

Q. Did you take any notes of those in this case?

A. I did not.

Q. You did not undertake that?

A. No, sir; I didn't examine to see the amount of refraction there was.

Q. However, you are familiar, of course, with those tests? A. I use them regularly.

Q. And with your specialty being the eye, with one or two others, and with your experience both in general practice and in the practice before the

(Testimony of Charles P. Dulin.)

public, and your service in the Army, you are acquainted with various tests that are intended to reveal one who is a faker?

A. We have a great deal of work like that, particularly in the Army.

Q. You know there are tests of that kind for use in the Army and among medical men elsewhere, don't you?

A. I have used several of them. [62]

Q. In this particular instance, you did not make such tests, did you, Doctor?

A. I could see no reason for it.

Q. No? A. No, sir.

Q. You were not requested to do that, and you did not do it in this case?

A. It seemed to me to be a plain case, the evidence as shown by the examination was sufficient to preclude any possibility of doubt.

Q. The results that you have testified to any way were arrived at without any of those tests?

A. Yes, sir.

The vision of this left eye was undoubtedly low. He may be able to distinguish light from darkness. It is a question of what you mean by vision. As to distinguishing objects or having any practical use of the eye, I don't think I can say. He might distinguish an object as large as a man at a distance of a few feet if he was properly placed between the light, but as to distinguishing objects with a definite vision, I don't think he has. As to determining the fact of whether he is actually blind

(Testimony of Charles P. Dulin.)

in that eye, whether that can be done, is questionable. You have to collect all of your evidence and sometimes you are fooled then. [63]

Q. If a man is properly coached, you think it might not be possible to prove that?

A. I would go further than that; I would say that the eye might be entirely blind; there might be no sight in an eye that was apparently normal, and it is exceedingly hard to tell just where the line comes.

I am familiar with the pupillary reaction to light test. The pupil might react to light and the eye be entirely blind. The practical means of examining the eye is to observe the reaction to light. By reaction to light, I mean that the pupil contracts as the stronger light is thrown in the center of the eyeball. When that fails to occur, it would indicate something abnormal. I am acquainted with another test that is applied in cases where a man claims to be blinded in one eye and has his sight in the other eye, with some tests that I used in that way to prove the falsity of the claim. I have applied it many times myself.

One of my favorite tests is the use of green and red lenses with green and red lenses and green and red figures or dots, as the case may be. The green and red cancel each other in the light, and consequently, with the red light, looking through a green glass, you get nothing, and vice versa, and looking through a red light—red glass, you see a red light. By changing the lenses in front of a

(Testimony of Charles P. Dulin.)

[64] man's eye so that he really, after a short time, possibly does not know which one is the red glass and which one is the green glass, and whether he is looking at red lenses or green lenses, he may become confused and he may see with the eye that was blind before. That is conclusive, would be fairly conclusive. In the course of a short time, he would be overtaken as an imposter, undoubtedly. You might have to examine him several times, in fact, I would prefer to give you an opportunity for no chance of an error. If one were to take a little time, I think you would expose him if he were an imposter.

There are other tests; that is the one I use and I find it is convenient, and it happens to be the one I am using the most of the time. One is frequently used where a lense is placed over the good eye with a short focus, not telling the patient about it, of course, that would not enable him to see a thing with the good eye, and then let him point out the objects presented to him. That is the focusing test. You focus the good eye so that he does not see at a distance. The ordinary patient, not familiar with these technical matters, would not suspect the purpose of the test.

The valuable part of the test is that you change those on the patient, and he, knowing that he is guilty of deception, at last becomes nervous more [65] or less, and finally guesses wrong. That test is just as conclusive as the other. It takes a little time and a little patience, all of those things.

(Testimony of Charles P. Dulin.)

There are tests coming up all the time, there are so many, you could hardly enumerate all of them. Those mentioned are the ones that I use most because they are the most convenient and the apparatus is handy. No, sir, I did not resort to any of those tests in the case of this plaintiff.

I do not undertake to tell the jury what was the cause of the condition of this eye. It might have been caused by various other things as well as traumatic accident. If dust or any foreign substance would get into the eye, that would come under the head of traumatic injury, that would be an injury. I would think a small scratch in my mind would be traumatic as well as a blow with the fist. Any injury inflicted by a heavy blow or by some rather small substance, if it was an injury, would be traumatic; I use the word in that sense.

Aside from getting struck in the eye with a rock or piece of wood or some heavy blow, the condition that I found in this eye could be caused by such a thing as dust or sand or irritation of anything getting into the eye. I say it could. In answer to your question what are some of the well known and common substances that you might name that could very well have caused that condition that you found in the eye, [66] there is sand and dust in the atmosphere and cinders that are present on the railroad and various places where they are using coal, anything that flies into a man's eye at all, pieces of leaves and bark blown off trees, if a person would take it into his eye.

(Testimony of Charles P. Dulin.)

Q. If a person would take it into his head to bring about such a condition purposely, he could very easily do it?

A. He could very easily do it if he had the nerve to last it out.

Q. If he continued a little while? A. Yes, sir.

Q. From your examination of this man, you would not undertake to say whether it was one kind of irritation or injury or the other, would you, Doctor? A. I would not attempt.

Q. No?

A. To make a definite statement of the case.

Mr. MATHEWS.—We have no further questions of the doctor.

Examination by the COURT.

Q. Suppose a man is injured, and a piece of boulder or ore ranging from a quarter of a pound to half a pound strikes him full in the eye, what effect will that have on the eye itself, not the vision, but the eye itself? [67]

A. Well, that depends upon the velocity with which it was travelling. If it was travelling with a velocity that I would associate with that kind of an accident, there would probably be considerable tearing of the soft part around the eye, considerable blood coming into the tissues and a great discoloration probably of the membranes of the eye, I guess that will be understood, and they will become reddened and even blackened when the blood has coagulated.

(Testimony of Charles P. Dulin.)

Q. Could it cause blindness without causing some external visible injury to the eyeball itself?

A. Sometimes blood will cause blindness.

Q. Without causing external visible injury?

A. Any would; yes. I have seen cases where they claimed they had no sight whatever, and there was no reason for them claiming it from any standpoint, other than just the condition of blood that causes that blindness, and this blindness persists sometimes for various lengths of time.

Q. You spoke of a blow. Do you mean a hard substance like rock or a piece of ore?

A. This instance that I referred to in my own personal knowledge was a boxing-glove.

Q. I am speaking of such instrument as this plaintiff testifies, a particle or substance as he testifies struck his eye, could it cause blindness without [68] tearing?

A. Yes; it might cause blindness for a temporary time, the result of shock to the eye, and the following flow of tears would increase the blood supply that comes with it, renders a man unable to see, at least, temporarily, if there is no permanent damage to the eye.

Q. Notwithstanding the fact that there is no visible sign of injury? A. Yes, sir.

Redirect Examination by Mr. DUNSEATH.

That condition may result in permanent blindness of the eye. There are cases where the sight does not return. Sometimes it is such that the patient

(Testimony of H. W. Rice.)

for a day or two does not realize that his eye is seriously injured.

Thereupon, plaintiff rested, and defendant, to sustain the issues on its part, offered and introduced the following testimony:

Testimony of H. W. Rice, for Defendant.

H. W. RICE, witness for defendant, being first duly sworn, testified as follows: [69]

Direct Examination by Mr. MATHEWS.

My initials are H. W. I live at present at Santa Monica, California. In January, February and March, 1919, I was living at Morenci. I am a physician and surgeon, having practiced eight years.

Mr. MATHEWS.—It is admitted by counsel for the plaintiff that Dr. Rice is qualified to testify as a medical expert.

I was practicing at Morenci in this state from January to March, 1919, being the surgeon of the defendant corporation. I had the responsibility and the care of surgical work for the company, injuries and other surgical cases that developed in the camp. Employees of the company who were hurt or became sick and were surgical cases came under my care.

I know the plaintiff, Epifanio Guerrero. I became acquainted with him in January, 1919. He came to the office for treatment for an injury to the eye. It was during the latter part of the month at my office. As I recall, it was between four and five in the afternoon; no one came with him. His

(Testimony of H. W. Rice.)

visit was on account of some injury to his eye.

Q. Did you examine and treat him?

A. I did. [70]

Q. How many times did you see him in all?

A. During the whole course of treatment?

Q. Yes.

A. A great many times. I can't recall. Over a period.

Q. You may state how long a period in all did that care of him and observation of him go over?

A. About five or six weeks or two months. I could not say exactly.

Q. Where was he during that time, if you know?

A. Well, he came to the office at first for treatments, and after that it was in the hospital, the company hospital.

Q. At Morenci? A. At Morenci.

Q. Do you know how long he was in the hospital?

A. Several weeks to a month.

Q. Was he still under your care while in the hospital? A. Yes, sir.

The head nurse, Miss Messing, and the nurse with her, Miss Daily, were the only nurses who had care of him. I had no care of the plaintiff after he left the hospital. That was in the latter part of February, or possibly the first of March, 1919. The [71] other doctor at Morenci who treated him and saw him during this time was Dr. Blatherwick. He was at that time a member of the defendant corporation's medical staff. Dr. Blatherwick was head of the hospital department and the only difference

(Testimony of H. W. Rice.)

between his work and mine was that he did not do any surgery. The surgical cases came under my jurisdiction. I remember that Dr. Blatherwick saw the plaintiff. I do not recall any other physician in Morenci. The plaintiff was referred by Dr. Blatherwick or me to outside physicians. He was referred to Dr. Martin and Dr. Gray of El Paso. They are specialists in that line. I am not a specialist in the eye, ear, nose and throat. I repeatedly examined the plaintiff anywhere from thirty to fifty times, at some of which times I made very careful examinations, at other times only casual.

Q. When he first came to you on that afternoon in the latter part of January, 1919, complaining of the eye injury, when you first examined him, what did you find?

Mr. KEARNEY.—We object; it is a privileged communication.

Mr. DUNSEATH.—Privileged communication.

Mr. MATHEWS.—We have the same question that was presented a moment ago. I presume we will be permitted to present any authorities we may have in regard to the matter? [72]

The COURT.—Yes; the plaintiff has permitted you without objection to go this far.

Mr. DUNSEATH.—I believe the only question was about seeing him and making an examination.

The COURT.—No, he has gone into the fact that he has treated him.

Mr. KEARNEY.—He does not testify to any treatment.

(Testimony of H. W. Rice.)

Mr. MATHEWS.—I would suggest that we do not think this question is objectionable. It refers, not to an oral communication made by the plaintiff, but to something which the doctor himself found in the course of his examination and treatment, about which examination and treatment the plaintiff himself has testified voluntarily, going to the extent of telling in part what that treatment consisted of, and actually complaining before the jury of what the doctor did, criticising and finding fault with him, and we contend clearly that under that state of the record that plaintiff himself has swept away his privilege and opened the door to us to have the doctor give the whole thing rather than be confined to the one-sided statement of the plaintiff.

The COURT.—There is no doubt about this being a privileged communication, and the only question is whether you have or have not yourselves opened the door for the introduction of that testimony by going as far as you have in the examination of the [73] plaintiff, and also in allowing, without objection, the examination of this witness up to the time when they called for the actual oral conversation between them.

Mr. DUNSEATH.—The examination of this doctor has not proceeded to any extent whatsoever that it becomes a waiver of the privilege. We could not consistently.

Discussion.

The COURT.—I will sustain the objection for the present.

(Testimony of H. W. Rice.)

Mr. MATHEWS.—We will ask the record to show our exception.

The COURT.—You may have an exception.

I saw the plaintiff after he came back from Phoenix and again after he came back from El Paso. I did not treat him after he returned from El Paso, nor send him to any other doctor. After he returned from El Paso, Dr. Blatherwick treated him.

Mr. KEARNEY.—No questions. That is all, doctor.

Testimony of Maude L. Messing, for Defendant.

MAUDE L. MESSING, witness for defendant, being first duly sworn, testified as follows: [74]

Direct Examination by Mr. MATHEWS.

My name is Maude L. Messing. At present I live in Morenci. I am a graduate nurse and have been for two years last December. I graduated from the Red Cross Hospital at Salida, Colorado, and am at the present time employed in the Phelps Dodge hospital at Morenci, which I entered one year ago last September. I was there during January, February and March, 1919. I had charge of the hospital.

I recall a patient by the name of Epifanio Guerrero who was there at one time, and recognize him now as the plaintiff in this case. He was in the hospital very nearly a month. I can give you the exact date. He came in the 9th of February, 1919, and left the 6th of March. He came in for

(Testimony of Maude L. Messing.)

treatment for supposed injuries to the eye. I saw him every day during that time and personally took care of his eye. When he came there on the 9th of February, that was the first time I had seen him. I could not tell what time of the day he entered the hospital. Some time on the night of the 30th.

I looked at his eye on that date. When I looked at his eye I found that the conjunctiva of the eye, or the thin membrane that covers the eyeball and lids seemed to be in quite an inflamed condition, very red and slightly swollen. That was the left eye. I saw the plaintiff every day during the time he was [75] there. I irrigated his eye every two hours during the daytime all of the while he was in the hospital. From the orders, his eye should have an irrigation of a solution which I prepared personally and boiled the implements, and in this case I used a hospital pitcher, we call them, a pint pitcher, and we pour the water over his eye. A vision bath, we call that, pour the water over his eye, holding the lids back. I did that myself. That was done every two hours for the first days or two weeks and after the inflammation seemed to subside, the time was lengthened by the doctor's orders. During the first week there was no apparent change and after about two weeks, the inflammation gradually went down, which is quite a common occurrence in all eye inflammations; the redness cleared up.

The first week there seemed to be no apparent change, which is common in many eye cases, and

(Testimony of Maude L. Messing.)

then the inflammation seemed to clear up to a certain degree, the pupil reflected the light. It did not entirely disappear, but it seemed to be no different from any other ordinary inflammation of the eye. I would not say how many times the redness returned. Perhaps two, maybe three. In the morning, early, when we would go in the room, the eye seemed to be worse than it was the night before. I think nine o'clock was the last time the eye would be fixed. Either nine or ten. These irrigations were not administered during the night. We had no night nurse. He was not watched during the night. [76] No more than just in a ward with other patients. In those times, two or three times, when we noticed a return of this redness, the first time was in the morning, when I would give him an irrigation, which would be directly after breakfast, probably eight-thirty or nine o'clock in the morning. I never noticed any foreign substance in the eye. I know of my own knowledge when he was sent to El Paso, it was the morning of March 5, 1919. He was sent by the company manager, Mr. Hodgson. That was after he had been in the hospital since the 9th day of February. I did not see him again after he returned from El Paso except once on the street during the summer, some months afterwards.

When in the hospital the plaintiff was kept in what is known as the Mexican ward. In our hospital we have one ward devoted almost entirely to Mexican patients. There are four beds in the room.

(Testimony of Maude L. Messing.)

The only complaint I recall that he made was nothing except no matter when you went into the room he always looked up at you and said he could not see. That was the statement he made to everybody that went in. He would make it about any time, any time anyone happened to go in and went towards him like they were going to do anything with him for his eye. He made that remark to me personally and to another nurse that was there at the time. I heard him say he was not able to see in that eye several times a day and every day. [77]

Cross-examination by Mr. DUNSEATH.

I do not understand Spanish fluently. This man did not talk in English. He said, "No veo fuate." I think it literally means, "I cannot see." I do not know whether it means, "don't see very well." I don't know the literal translation. That is the interpretations we give to any case in the hospital.

This redness that I spoke of would recur after we had stopped treating him for eight or ten hours. There would be a lapse between each treatment of eight or nine hours, when this redness appeared. That would not occur naturally. We continued the treatment every two hours because the doctor ordered it that way and we carry out the orders of the doctor of the hospital. The treatment was for the purpose of keeping the redness out of his eye.

Q. And if this treatment stopped, the inflammation again come in? A. Not necessarily.

Q. Well, would you say it would not?

A. No, I wouldn't say that.

(Testimony of Maude L. Messing.)

Q. You know it does, though, don't you?

A. What?

Q. The redness comes back again if the treatment is stopped? A. Not always.

Q. It did in this instance, didn't it? [78]

A. Maybe two or three times; it did not every morning. The treatment was not given in the night.

Q. You mean it was not done?

A. Not during the night; no.

We stopped treatment at about nine-thirty. We did not get up until seven-thirty and had breakfast at eight. The treatments started the first thing at about eight or nine o'clock. There was a lapse of eight or nine hours, and he would complain about not being able to see out of his eye.

Witness excused.

Testimony of Joseph P. Hodgson, for Defendant.

JOSEPH P. HODGSON, witness for defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. MATHEWS.

My name is Joseph P. Hodgson. I live at Morenci, where I am the manager of the Morenci Branch of defendant corporation. I have been in charge for about a year and a half. The physicians are under my supervision.

I know the plaintiff, Epifanio Guerrero. I first became acquainted with him in the latter part of January, 1919. The occasion was an alleged eye injury. He came to see me at my office about that supposed injury. I should say I saw him about the

(Testimony of Joseph P. Hodgson.)

25th of February. At that time he claimed the injury was of recent origin, only a few days prior to the time he called. I should say that I saw him seven or eight times altogether. These visits were about two and a half months apart. I could not see his eye. He had blue eyeglasses on each time. [79] Not the kind he is now wearing. They were blue. He did not claim to be blind at the time he called to see me at the office. He said he could see, but that he had received an injury to his eye; that he had been injured underground by a piece of rock or dirt falling into his eye. He didn't specify which it was. He had been under treatment by Dr. Rice when he first came to see me. Dr. Blatherwick also had charge of him there. They are both company physicians. As to the other doctors to whom he was referred, I first sent him to Dr. Ancil Martin, of Phoenix, for an examination and necessary treatment. He afterwards returned to Morenci. He came into my office and we had a discussion, talked the matter over, and I told him I was willing to send him to any specialist or specialists for a careful examination, if he cared to go.

Q. What was the purpose of these different examinations to be made?

A. So as to be absolutely sure from those specialists that he had really received an injury that had injured his eye, I would settle with him.

Q. You had in mind getting information?

A. Yes, sir.

Q. To act upon? [80] A. Yes, sir.

(Testimony of Joseph P. Hodgson.)

Q. The plaintiff consented to that?

A. Yes, sir.

Q. What specialist did you conclude to send him to?

A. Dr. Detweiler, and I asked in a letter to Doctor Detweiler to also get another specialist and make a report of the condition, but not treat him at all.

Q. The plaintiff understood, and was assured that that was what you wanted, this information?

A. Yes, sir.

Q. Did the plaintiff go then on his trip to El Paso? A. Yes, sir.

Q. You afterwards received a report upon him?

A. I did.

Q. Now, who arranged with the doctors themselves to make the examination, and who paid them for making it?

A. I arranged by correspondence with the doctors, and we paid the—the company paid the expenses both of Mr. Guerrero's trip to and fro, and the doctors' expenses, too.

Q. You made the arrangement on behalf of the company? A. Yes, sir. [81]

Q. And received the information that they furnished you? A. Yes, sir.

I saw the plaintiff after he returned from El Paso. He still had those dark glasses on. I could not see his eye. I did not have him take them off or make any examination. The Doctor Martin I speak of is a physician at Phoenix,—Dr. Ancil

(Testimony of Joseph P. Hodgson.)

Martin. He is a specialist in diseases of the eye. I requested his presence, but he is ill and could not come; that is the reason he is not here.

Mr. DUNSEATH.—No cross-examination.

Testimony of J. B. Gray, for Defendant.

J. B. GRAY, witness for defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. MATHEWS.

My name is J. B. Gray. I reside at El Paso, Texas. I am a physician. I treat the eye, ear, nose and throat. I graduated from the University of Louisville, Louisville, Kentucky. I took my special work at Chicago, Eye, Ear, Nose and Throat College. I have practiced my profession twenty-seven years. I have devoted twenty years to my specialty. I have practiced in El Paso twenty years. I have seen great numbers of [82] eye cases during that time.

I recall having seen the plaintiff, Epifanio Guerrero, in March, 1919, at my office in El Paso. He was referred to me from Morenci. Phelps Dodge Corporation. I examined him at the request of Dr. Blatherwick, the head physician at the company's hospital at Morenci. When I examined the plaintiff, I was making the examination for the Phelps Dodge Corporation. They compensated me for my services. My records show that the plaintiff called at my office on March 5th, 6th, and, I think, 7th, in 1919. When the plaintiff came to my office my recollection is that someone was with him.

(Testimony of J. B. Gray.)

I don't remember who—some friend, I think.

I examined the plaintiff. Dr. Detweiler assisted me. He is also a specialist in eye cases. His office is in the same building as mine. Part of the examination was conducted in my office and part in his.

Q. What sort of an examination did you put the plaintiff through?

Mr. DUNSEATH.—We object to the question on the ground it is privileged.

The COURT.—Objection sustained.

Mr. MATHEWS.—I would like to be heard on that.

The COURT.—All right, I will withdraw the rule and allow you to be heard. [83]

Mr. MATHEWS.—The point here is a new question, so far as I know, and it has not been raised previously in any other case in this court. We have here a situation where the relation of patient and physician within the meaning of the statute does and did not exist. The situation is exactly similar to that which would exist where a prospective employee comes to a prospective employer and under the rule submits himself to a physical examination to enable the prospective employer to know whether he is physically fit to work; that that is the sole purpose of the examination. Not being that of medical treatment, but to secure information for the employer for his use in determining this very fact. That is frequently the case, and I recall one instance, at least, where such testimony was permitted in this court, the testimony of a physical examina-

(Testimony of J. B. Gray.)

tion, upon application for employment. The theory of it is that there is no relation of physician and patient in the ordinary sense. But the situation is one where a person who is examined voluntarily submits himself to a physician in order to enable the third person to know something of the condition, which he otherwise would not be able to ascertain for himself. We have here precisely the same sort of situation. The purpose may be a different purpose, but the situation, so far as I can see any legal distinction, is similar. We have here a man who has been an employee and has received or claimed to have received an injury, and he is negotiating with his employer seeking [84] some sort of a settlement, and the employer desires to know what the true condition of that man is for his own information and guidance in making a settlement or refusing such a settlement, and that purpose if fully explained to the employee, the person supposed to be injured, and the arrangement has been made by mutual consent between the employee and the employer whereby a physician may be used, and that with the understanding that the information obtained by the physician shall be communicated to the employer; made known to him for the very purpose of possible settlement, or possible negotiations. Now, if there is any element of confidence to that, it does not occur to me. It is not the relation of patient and physician any more than he was able to go to some other place and have this examination made. Suppose he went to some

(Testimony of J. B. Gray.)

physical director or some athletic trainer and said, "I want you to measure me for such and such a thing; I want you to determine certain things about my body, and my size, etc., because another man wants it, and I want him to have it, and I am willing that he should have it." There would be absolutely no relation of physician and patient as ordinarily understood. It just happens in this case that the person who is able to get this information, and who both parties desire to go and get the information is a physician. His ability depends upon the fact that he has expert medical knowledge, and the testimony of Mr. Hodgson, coupled with the testimony [85] already given by Doctor Gray, shows absolutely no relation of physician and patient existed in this case. The privilege never existed, and it could not have been intended to have existed. I think that the privilege is waived, if one ever existed, when I say, "All right, I will go to a doctor and let him examine my eye or anything else about me; I will let him examine me with reference to an injury or supposed injury for the purpose of enabling you to know those things about me which you are now not thoroughly satisfied about." Now, if there is going to be a question of privilege raised, certainly I waive that privilege when I give that consent. I think the true theory of it was that the relation of patient and physician never existed. There was no understanding that there was to be any treatment in this case. As to the other physician, Doctor Martin, Mr. Hodgson

(Testimony of J. B. Gray.)

testified he sent him there for examination and possible treatment. Not so here in this case. It was solely a matter of obtaining information about this man. He might have said, "No, I will not submit to it. I will let you find out the best way you can," but he says, "All right, I will go." He did not take advantage of that. He says, "If you will pay the expenses, arrange for some doctor specialist in this line, give me the money to go down there, I will go and submit myself so that you may have the information which you have not now, and then perhaps we will be able to arrive at some settlement or something. You will have the facts more [86] to your satisfaction." I can't see that the confidential relation or possible privilege could grow out of that.

The COURT.—I think the Court should know whether there was such a relation at the time, and I suppose that it would only be fair to the defendant for the plaintiff to testify as to his understanding, whether he did so agree before ruling on that.

Mr. KEARNEY.—Shall we put the plaintiff on the stand and examine him a little bit?

The COURT.—I think so.

Mr. KEARNEY.—Just one question of Doctor Gray.

I am not in the employ of the Phelps Dodge Corporation. I am not employed by them down there. I am not in their pay. In this case, I am working for them. I called Dr. Detweiler in. We

(Testimony of Epifanio Guerrero.)

examined him together. Dr. Detweiler is not employed by the company that I know of. It is my opinion that he is not. I do not know.

**Testimony of Epifanio Guerrero, on His Own Behalf
(Recalled).**

EPIFANIO GUERRERO, being recalled by his counsel by permission of Court, testified as follows:
[87]

Direct Examination by Mr. KEARNEY.

I understood that I was being sent to El Paso to benefit my eye. It would do my eye some good, with the intention that I was to receive treatment for my eye. Most assuredly; how would I be in this fix? I paid hospital fees when I worked for the company.

The COURT.—I want to know if there was any understanding between this witness and any officer of the company at the time he left.

Mr. KEARNEY.—He says now, to get a better eye.

Cross-examination by Mr. MATHEWS.

The day that I left, the doctor sent me to El Paso and I got there at two-forty and I went to the doctor's right away and I left there the next day. They did nothing but examine me. I came back as soon as I was examined.

Redirect Examination by Mr. KEARNEY.

Q. Did you believe that the doctor that you saw at El Paso was acting with the doctors at Morenci?

(Testimony of Epifanio Guerrero.)

Mr. MATHEWS.—That is objected to on the ground it is irrelevant. What this man believed since, founded upon some unreasonable ground, is not competent. [88] He may believe anything. The true situation here is whether or not this arrangement that Mr. Hodgson has sworn to occurred here. That has not been contradicted so far by anybody.

The COURT.—I will ask him myself.

Examination by the COURT.

Q. What, if any conversation, did you have with Mr. Hodgson, the gentleman who just testified here, with reference to your going to El Paso?

A. Nothing.

Q. Did, or did he not request—did you not request of him or the company a settlement for the injury to your eye? A. Yes, sir.

Q. Did he or did he not tell you that if you would go to El Paso to be examined by a specialist, an eye specialist, and that specialist made a report to the effect that you had such an injury, that he would settle with you?

A. No, sir, he did not tell me anything.

Q. Did you have any conversation with him to the effect that you would go down there and be examined, have your eye examined by the El Paso specialist and that if that surgeon should be permitted to make report to him as to the condition in which he found your eye?

(Testimony of Epifanio Guerrero.)

A. No, sir, I have never been to El Paso after that. [89]

Q. After what?

The INTERPRETER.—I will ask that question again.

The COURT.—All right.

The WITNESS.—No, sir.

Q. Was it your purpose, and the purpose of the company's officer, to obtain a report from the specialist in El Paso in order to enable him to determine whether or not he would settle with you for the injury to your eye?

A. Of the company do you mean?

A. Yes.

A. He only examined my eye, but he never told me anything.

Q. Was it agreed between you and Mr. Hodgson before you left Morenci that you should go down to El Paso and have your eyes examined and that that specialist should make a report to him, and if the report showed an injury, that he would settle with you for the injury?

A. No, sir, he didn't tell me nothing.

Witness excused.

The COURT.—Well, the evidence in that matter being evenly balanced; I feel that I ought to sustain the objection.

Mr. MATHEWS.—This is a little unusual, your Honor. I take it that this testimony that the plaintiff [90] has given at this point is positively rebuttal. It is not a part of his main case.

(Testimony of Epifanio Guerrero.)

The COURT.—No, it is preliminary, to enable the Court to determine whether or not this testimony should be admitted, or whether it should be excluded because it is privileged.

Mr. MATHEWS.—I understand perfectly what it is for, but that is the way in which these things should come. The plaintiff puts in his case, and at least, the defendant has made a *prima facie* case, or showing here, and a very strong one, that a certain state of facts existed which would take this entirely out of the privileged communications. Now, in rebuttal—it does not matter when it happened—the plaintiff is permitted out of order, to meet that *prima facie* showing and endeavor to overcome it.

The COURT.—Only for the purpose of enabling the Court to determine whether the doctors' evidence is privileged.

Mr. MATHEWS.—The plaintiff testified that he never knew that such a man as Hodgson existed, and naturally he would say he never had any such conversation with him, but when we make this showing, we are entitled to put the testimony in on the face of this *prima facie* showing, and then if the plaintiff wants to attack this *prima facie* showing, he does it on rebuttal, and then after the showing is presented, the whole thing, under proper instructions, goes to the [91] jury. But to say that while the *prima facie* showing that we have made here, and then right in the middle of the trial allow the plaintiff to come in and attack that, without letting us go

(Testimony of Epifanio Guerrero.)

through with our testimony, and then say because the testimony is conflicting, and in the opinion of the Court evenly balanced, that the rule should be made against the defendant, and the defendant will not be permitted to put the testimony in at all, seems to me rather hard.

The COURT.—Maybe you are right.

Mr. MATHEWS.—It strikes me. I don't want to bring in something here for the purpose of making an error, but it strikes me—it seems to me clear that it is like many, many other situations where *prima facie* showing are to be made first. That does not mean that it is final. It may be overcome later by the rebuttal, but if we make a *prima facie* showing, and put this in proper form, and then like anything else, or other situations, it is simply a matter for the jury, under the proper instructions from the Court what to do with this, in case they believe such and such a thing, and disregard it if they do not believe such and such a thing, and not a matter to be finally determined by the Court in its finding.

The COURT.—You object to it?

Mr. KEARNEY.—I object to it on the ground it is privileged.

The COURT.—I sustain the objection. [92]

Mr. MATHEWS.—We ask that our exception be entered.

The COURT.—You may have an exception.

Testimony of J. B. Gray, for Defendant (Recalled).

J. B. GRAY, being recalled as a witness for defendant, testified as follows:

Direct Examination by Mr. MATHEWS.

The examination was made partly in my office and partly in Doctor Detweiler's office.

Q. What instruments or equipment have you there for the purpose of making examinations?

Mr. KEARNEY.—I object to that as immaterial and irrelevant.

The COURT.—Objection sustained.

Mr. MATHEWS.—We ask for an exception.

Q. What part of the examination did you conduct, and what part did Doctor Detweiler conduct?

Mr. KEARNEY.—We object to that; it is privileged to him.

The COURT.—Sustained.

Mr. MATHEWS.—The defendant desires an exception.

The COURT.—Exception.

Q. Now, what—I will ask you this, and you need not be in a hurry to answer it, because the counsel [93] on the other side will object. I don't want to waste time, your Honor.

The COURT.—You may ask the question.

Q. You need not be in a hurry with your reply, Doctor. Did you and Doctor Detweiler, or either of you, on this occasion make a test of the plaintiff to ascertain whether or not he really was blind in his left eye?

(Testimony of J. B. Gray.)

Mr. KEARNEY.—I object to that on the ground it is privileged.

The COURT.—I sustain the objection.

Mr. MATHEWS.—The defendant excepts.

Q. Now, one more question along that line, slightly different, your Honor. Did you and Doctor Detweiler or either of you on that occasion apply the scientific tests for the purpose of ascertaining whether or not the plaintiff's left eye was normal or abnormal?

Mr. KEARNEY.—We object to that question on the same ground.

The COURT.—Same ruling.

Mr. MATHEWS.—Same exception, Mr. Reporter.

Q. And on the same occasion did you also make an examination of the plaintiff's right eye?

Mr. KEARNEY.—I object to that on the same ground.

The COURT.—Same ruling.

Mr. MATHEWS.—Same exception. We have no further [94] examination. Just one more question.

Q. As a result of that whole examination made by yourself and Doctor Detweiler, did you reach a conclusion as to the condition of the plaintiff's eyes?

Mr. KEARNEY.—I object to that on the same ground.

The COURT.—Sustained.

Mr. MATHEWS.—Exception.

(Testimony of J. B. Gray.)

I have seen a great many hundreds or thousands of eye cases where injuries have happened to an eye. I have had experience where an injury occurred to an eye as a result of a blow, or as a result of it being struck with a rock or other hard substance.

Q. Suppose, Doctor Gray, a man were at work in the mine, hammering and breaking up rock or ore with an eight pound sledge-hammer, and in so doing broke off a piece of that rock or ore some three or four inches long and an inch or two thick of heavy rock with such force and violence that will cause that rock when struck and broken by the hammer, to fly off the main rock and hit him in the eye. What, ordinarily, would result in the way of outward appearance and injury to the parts around the eye?

A. The eye would become very red, and on close examination you could see where the rock had hit. There would be a contusion of the tissues of the eye. It [95] might rupture the blood vessels, and you would have inside hemorrhage.

Q. What mark or bruise would such a lick make around the surface of the eye?

A. It would cause some blood to collect under the skin.

Q. Resulting in what is commonly spoken of as a black eye? A. Yes, sir.

Q. When a rock of that sort struck a man in the eye with the force I have mentioned, would it or

(Testimony of J. B. Gray.)

would it not leave some permanent sign or mark on the eye ball itself?

A. Sometimes it would and sometimes it would not. It would depend upon the force.

Q. That would depend somewhat on the size and character of this rock, would it not?

A. Yes, sir.

Q. Whether the sharp edge struck, or what part struck?

A. Yes, and whether the lid was closed when it hit.

Q. Yes?

A. Yes, sir.

Q. What would be the probable effect as to blindness resulting from such a blow?

A. Well, that would depend too upon the size of the body perhaps, and the force with which it was [96] coming and hit the eye.

Q. Would it necessarily cause blindness?

A. Not necessarily, no.

Q. If it was going to cause blindness, about what time would the blindness manifest itself?

A. The immediate effect of the blow would be the blindness; the blindness would be immediate upon the blow.

I understand the tests that are made by men in my profession to determine whether or not one can actually see with an eye he claims blindness in, one test which is relied on pretty closely is what they call the red-green test, red and green letters and with a red and green lense before the eye. If a man came to me or any other eye specialist and

(Testimony of J. B. Gray.)

claims he is blind in the left eye and able to see in the right eye, I would apply the tests, I would put my letters up, red and green letters up on the card, and put them up a certain distance, say sixteen or twenty feet and apply these red and green lenses in spectacle form and have him look at those letters. If he reads all of those letters he can see in both eyes, and if he did not with one eye and will only see certain letters, it depends whether the green or red lens before the good eye. That test is absolutely conclusive, I think. I don't believe he could deceive me. [97]

We have one other test, ordinarily known as the Fogging Test. A short focus strong convex lens before the good and a strong lense before the blind eye. If he was faking, if he were an imposter or faking, he would read correctly, although he was not conscious he was doing it with the bad eye. That is also regarded as conclusive. There is a test that is commonly relied upon with reference to the pupillary reaction of the light. The pupillary reflexes, we always examine the eye with the pupillary reflexes, of course. An eye that sees at all, will react. An eye that is absolutely blind, the chances are it will not, although it may. He may have a blind eye and still the pupil or pupillary reflex is normal. It might be a case where the eye is almost blind and still be some reflexes. I would not call that test conclusive. The others are regarded as conclusive.

Q. If you were called upon to examine a man

(Testimony of J. B. Gray.)

who was in court and where there was a question as to the genuineness of his blindness, would you consider your examination complete until you applied some of those tests that you have mentioned?

A. No, I would make those tests first.

Q. In all of those cases, you think one of those tests should be used? A. Yes, sir. [98]

Q. In a case of that sort, when the plaintiff was in court claiming to be blind in one eye, and he was being examined for the purpose of shedding light on this, would you consider it a complete examination by simply confining yourself to looking into the eye, and then using an ophthalmoscope and ophthalmometer and applying light to it?

A. No, I would not think it was complete.

Q. You are familiar with those instruments I have mentioned, I presume? A. Yes, sir.

Q. And with their purposes? A. Yes, sir.

Q. But they are not conclusive, an ophthalmoscope and ophthalmometer, to determine whether a man is blind or not in all cases?

A. I would say this, that they furnish much information, but you could not say positively by using them.

Q. Are they or not regarded as conclusive tests where a man is suspected or faking?

A. They are useful in arriving at it.

Q. But which ones are absolutely regarded as conclusive where a man is claiming injury of that kind?

A. I think those two that I have mentioned, red

(Testimony of J. B. Gray.)

and green test and the Fogging Test. [99]

Cross-examination by Mr. KEARNEY.

In response to your question if I were called upon to make an examination concerning the condition of a man's eye, and that is all that was stated to me, would I go through all of those tests, I will say, if you wanted an absolute opinion, I would take him through all those tests. In my examination as to the condition of a man's eyesight, I believe I would use all of those tests. Not all the time, but if I know or suspect he is faking, I would use all these tests. I don't always apply those tests.

The COURT.—What do you mean by “these tests,” all three of them or two of them or one?

The WITNESS.—Well, the red and green test.

I don't always do that to all patients who come into the office. I was present when Dr. Dulin testified. By the examination that he testified to making, I could tell whether the eye was normal or not in appearance by those instruments. You could not say positively whether he was blind or whether he was not blind. You could not say whether the pupil was normal or not, you could say whether it was diseased or not in appearance. I don't think you could say whether it was defective unless you found some diseased condition. It would show diseased condition [100] there, if it was there.

In stating in the early part of my examination that a blow on the eye with a rock would cause

(Testimony of J. B. Gray.)

immediate blindness, what I meant to say was that—I don't know whether I made myself very clear. Oftentimes, you get a blow upon the eye with a rock of that size and you get an internal hemorrhage into the eye and the chances are you will lose the vision right then by so much blood being thrown into the eye. It might not cause immediate blindness. I don't think as a rule you could figure on that causing gradual blindness. It might come on later. I question if it would,—if it would become worse. These bruises as a rule do not carry much infection. They are simply a bleeding under the skin and as a rule do not infect. If the eyeball or a part of the eye was destroyed you would get an infection. You might get an infection that would cause blindness. It would with an infection in the eye.

It is seldom that a blow is struck directly on the eyeball. In many eyes, the fact of the eye closing would protect it, but the fact that we get so many foreign bodies in the eye, shows that it does not close every time. I do not think that the lid protects the eye in so very many instances. It does in some.

Redirect Examination by Mr. MATHEWS.

I have seen cases where there was a roughness or irregularity in the clear part of the eye. In examining [101] a patient and finding that condition, when you do not know the cause, that fact alone would not enable one to say that the man is

(Testimony of J. B. Gray.)

blind. Many things might be the cause of such condition. You could get a roughness, a granulated lid or trichoma might give a roughness of the eyeball. It would not necessarily indicate that the man had received a blow on the eye or had a rock in his eye. You could get the roughness, it could happen from injury or other things. Such a condition might be caused by most anything, sand or any foreign matter in the eye. It would cause a roughness easily. A vein of the eye, a cornea rupture.

Testimony of D. W. Detweiler, for Defendant.

D. W. DETWEILER, witness for defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. MATHEWS.

My name is D. W. Detweiler. I reside in El Paso. I practice medicine, limiting the practice to the diseases of the eye, ear, nose and throat. I graduated from the University of Iowa. For ten years I prepared for the practice of my specialty. I had two years of post-graduate in the hospitals of Chicago. I have engaged in the practice of my profession thirty-one years and of my specialty twenty years. I was located in Iowa, with the exception of two years in [102] Chicago, up to the year 1907, when I moved to El Paso, and have been there since. I have had a great many eye cases.

I first saw the plaintiff, Epifanio Guerrero, about the 6th of March, 1919, in the office of Doctor Gray,

(Testimony of D. W. Detweiler.)

in El Paso, and later in my office in the same city; that was the same Doctor Gray who was present here on the stand yesterday. I participated in the examination referred to. I was present in the courtroom yesterday when Doctor Gray was on the witness-stand. I heard him testify. I am the same Doctor Detweiler who was referred to in his testimony as co-operating with him in his examination of the plaintiff.

Mr. MATHEWS.—Now, if your Honor please, I suggest in order to save going through all of those questions and objections separately, that I may now ask counsel if they will stipulate that the record show the same questions regarding the examination may be considered as having been put to Doctor Detweiler as were put to Doctor Gray on yesterday, and the same objections and the same rulings?

Mr. KEARNEY.—We will stipulate this that any information elicited, or any communication that the plaintiff made to the witness as to any treatment or examination—

The COURT.—That is not what he asked you to stipulate. He asked you to stipulate that the [103] same questions may be regarded as asked of this witness that were asked of the other witness.

Mr. KEARNEY.—That is fair.

Mr. DUNSEATH.—We will stipulate this.

The COURT.—You do so stipulate, and the record may so show.

(Testimony of D. W. Detweiler.)

Mr. KEARNEY.—We agree that the record may so show.

The COURT.—And the ruling will be the same.

Mr. KEARNEY.—Will be the same.

I heard and remember that part of the examination of Dr. Gray in which certain hypothetical questions were put to him as to diseases of the eye, as to various methods and tests which may be applied to ascertain whether one was blind or not blind in one or both eyes. I agree with the conclusions which Doctor Gray announced here on the witness-stand. I have used the tests he spoke of many times. Within the past two years, since we have had the epidemic of influenza in the country, I have seen several patients who suffered with influenza. I have found in some cases that the influenza sometimes affects one's eyes or impairs one's eyesight.

Mr. MATHEWS.—You may cross-examine.

Mr. KEARNEY.—That is all, Doctor. [104]

Testimony of H. H. Starke, for Defendant.

H. H. STARKE, witness for defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. MATHEWS.

My name is H. H. Starke. I live in El Paso. I am a physician, specializing in the diseases of the eye, ear, nose and throat. I have practiced medicine twenty-four years and specialized fifteen years. I graduated from St. Louis University. As to

(Testimony of H. H. Starke.)

special work, I was in the General Hospital, Chicago General Hospital, Ophthalmic Hospital, from 1906 to 1908. Since that time I have practiced in El Paso.

I saw the plaintiff, Epifanio Guerrero, in court yesterday. I have seen him before in my office in El Paso, approximately a year ago.

Q. What was the occasion of his coming to you?

Mr. DUNSEATH.—We renew our objection against before they go any further. We object to any statement made to this doctor, or any examinations made by him, or the results of any examinations, or any communications had with him by this plaintiff.

Mr. MATHEWS.—I don't want to bring out anything of the sort. I simply want to ascertain now whether the plaintiff did or did not consult the doctor professionally. [105]

The COURT.—He may answer that.

The WITNESS.—Why, he—

The COURT.—That is shown that would not—until that is shown it would not be a privileged communication.

Mr. DUNSEATH.—I object to it; that is all.

The WITNESS.—I saw the patient; he came in for me to examine his eyes.

Q. Now, without saying what the examination disclosed or what he said to you or anything of that kind, I wish to ask you, Doctor, whether or not you did make such an examination.

A. I examined him.

(Testimony of H. H. Starke.)

Q. Now, I will put a question which will probably be objected to, and the doctor need not answer promptly until the objection is made. What did you find as a result of that examination?

Mr. KEARNEY.—Now, we object to that as privileged.

The COURT.—Objection sustained on the ground it is a privileged communication.

Mr. MATHEWS.—Defendant excepts.

The COURT.—Yes.

Mr. MATHEWS.—No further questions with the doctor.

Mr. DUNSEATH.—No questions.

Mr. MATHEWS.—The defendant rests.

AND THE DEFENDANT HERE RESTED ITS CASE. [106]

The COURT.—Gentlemen of the Jury, upon the application of the defendant, with the consent of the plaintiff, the Court has appointed Doctor Hardridge of Phoenix to make an examination of this plaintiff and make a report thereon. As he is making that examination at this time and it will take a little while. Doctor Morris, of Tucson, could not make the examination, and Doctor Hardridge was satisfactory to the plaintiff and defendant, so I think you may be excused until eleven o'clock.

Testimony of B. F. Hardridge, for Defendant.

B. F. HARDRIDGE, a physician selected by the Court, upon application of defendant and with the consent of plaintiff, having been first duly sworn, testified as follows:

(Testimony of B. F. Hardridge.)

Examination by COURT.

My name is B. F. Hardridge. I am an oculist. I graduated from the University of Pennsylvania. I practiced my profession exclusively from 1903 to 1913 at Philadelphia, and at Phoenix, Arizona, since that time. I have made a specialty of ophthalmic surgeon, oculist.

Q. Well, Doctor, you were appointed by this Court to make a careful examination of the plaintiff and to report to the Court and the jury the result [107] of such examination. You may now state to the jury exactly what you did, and describe without using any more technical terms than will be absolutely necessary, the result of such examination.

A. I examined the plaintiff in this case under very difficult circumstances; spent about three hours, in which he gave me a history of having received an injury of the left eye on January 10, 1919. He was treated at the local hospital for a short time, referred to an oculist in Phoenix, the name of whom he did not know, was examined once and returned the following day to Morenci, where he was treated again for a time, about twenty-five days. He was then sent to El Paso, where he remained over one day, receiving an examination and returned to Morenci where he was treated about three weeks. The superintendent then had an interview with him and offered him—

Q. You need not state anything about any conversation with the superintendent.

(Testimony of B. F. Hardridge.)

A. At the time of the injury, he complained immediately following that that he had a sensation of blindness and was unable to see anything. Since that time he has never been able to see, not even light. Early in his trouble he had severe pain in his eye which in the course of time subsided. Since then he has had periodic pains of a moderate degree, beginning in the left occipital region—that is, the [108] back part of the head, radiating to the eye. He claims previous to the accident he could see perfectly in both eyes, health always good, smallpox when a child. Recently he was examined by another oculist, the name of whom he did not know, and this morning by myself.

I examined him and I found both eyes responded to light, both pupils responded to light. I discovered that he can fix the head of a match with his left eye, and the right turning in. In covering the left eye, he then immediately fixed with his right eye. The interior chamber, that is, the front part of the inside of the eye, is normal. There are no scars about his face or eye. He has a terygium of the left eye. I might explain that that is a little loose tissue growing over the cornea. I might also explain that that has nothing to do with the accident. It is a condition that may grow in spite of an accident or not related to an accident. I am speaking of the left eye. This applies to both eyes, and fixing a match stick or a small point claimed not to see beyond the median line. That is, to the left of the median line, yet his right eye

(Testimony of B. F. Hardridge.)

will follow the object at least eight inches to the left and twelve inches from the nose, indicating that he surely sees on the left side.

In the white part of the eye are spots which are present in both eyes and not in the one eye. These have probably no significance at all. The reason I lay stress on the fact, it is in the right eye the same [109] as the left, is to indicate that the condition is not confined solely to the injured eye.

In the matter of standardizing his vision, I was absolutely unable to do so for the following reasons: This man has been examined doubtless a great many times, is more or less familiar with the technique, rendering it very difficult for one to determine accurately. For example, in testing him with the confusing tests of the red and the green, he admitted once only, but I could not get him to repeat seeing red with the red lens in front of the left eye and the green lens in front of the right eye. The reason that I had difficulty in doing this and with other subsequent tests, was his absolute refusal to make answer to my questions. The Jackson Fogging Test, which is the placing of a high facus glass in front of the good eye with a weak lens in front of the left eye, but he refused to answer, claiming he could not see anything, not even light.

This same combination with the minus six in front of the right eye, he still persisted in refusing to even recognize light. I might explain that the minus six in front of his good eye absolutely

(Testimony of B. F. Hardridge.)

neutralized the plus six which I placed there previously, so that he could not have helped but at least seeing with his right eye. Yet he refused to admit all this.

Another test, the Prism Test. The prism [110] passed down in one eye, permitting him to walk about the room, but he absolutely refused, saying he was unable to do so. If the left eye was absolutely blind, he unquestionably could walk about the room with one good eye. The fact is the lens is confusing. With the Maddox Rod, that is a glass which gives a red streak in front of one eye, the right eye, with no glass in front of the left eye, he absolutely refused to admit he could see anything, even the red light. He admitted without any aid to the vision of six-six, at least in the right eye. That is, normal vision in the right eye, and I should have said further, and this really goes in with the first description, he has an internal squint. That is, his left eye turns in towards the nose. In radiating the eyes to the left, both eyes, I mean, the left eye will pass a short distance beyond the median line to the left. He will fix with the left eye, the right being turned in. This shows a weakness of the left external rectus, with an undoubted ability to see or fix with his left eye.

In the matter of field of vision, I was unable to get him to corroborate in seeing with the left eye any object whatever. With the right eye, however, I was able to obtain a very small field of vision; that is, passing probably from different

(Testimony of B. F. Hardridge.)

directions. Instead of seeing, for example, ninety degrees in the temporal region, he only admitted seeing [111] about ten degrees. Certainly this was conspicuous. Whether the carrier was brought in from the outer field, or carried in from the center, he stopped approximately at that point. I am speaking of the good eye now, the right eye. With the red color in the carrier he stopped at precisely the same point that he did with the white field. With blue, his vision was almost central to five degrees. The character of the field is absolutely misleading in that his blue field is smaller than the red. Also that the red field is the same size as his former field; this is absolutely inconsistent. A blue field is very much larger than red. I cite this regarding his right eye, his good eye, to indicate how very misleading and how difficult it is to collect different data regarding the case.

I also call your attention to the fact that the pupils are absolutely the same size on both sides, that they both react to light, which is absolutely certain that there is a degree of vision in both eyes, but as I stated a minute ago, I was absolutely unable to standardize the degree or amount of vision in his left eye.

From this examination, that is, looking inside of the eye, I had extreme difficulty, owing to the surrounding conditions, and also to the fact that I could not get him to keep his eyes still, but so far as I was able to determine, I found no pathological trouble inside of his eyes, either eye. The man has

(Testimony of B. F. Hardridge.)

an internal [112] squint which may or may not have been present at the time when the supposed injury occurred. To sum up, the man undoubtedly sees a certain amount with the left eye. I was not able to find any definite evidence of trauma. I don't think I have anything further.

Examination by Mr. KEARNEY.

I don't know how far the man could see with his left eye. I don't know whether the plaintiff could see me from where he sits with his right eye closed. I do not say how much the vision in his left eye is. I was absolutely unable to standardize. I do not want the jury to understand that it is impossible for a traumatic injury to cause the condition that I found in his eyes. It is possible that the injury might have been received from a blow to the eye, but hardly probable. I don't say that it could not occur, it is possible in so far as all things are possible. I have not seen anything like it. I didn't see any condition present of trauma or anything else.

Q. That may be, but that was a long time ago. This might have resulted from some infection?

A. But I didn't see anything that has resulted.

Q. Well, you found results that he cannot see; he hasn't very good vision in that eye?

A. He can't see? He can see. [113]

Q. Well, how much can he see?

A. I don't know; I am unable to standardize it.

Q. Can you say with any degree of positive cer-

(Testimony of B. F. Hardridge.)

tainty what caused the conditions in which you found his eye to-day?

A. Why, very likely I would be inclined to find that he had an internal squint.

Q. Well, do you know positively what did bring it on? A. No, I do not.

Q. You don't know? A. No, sir.

Examination by Mr. MATHEWS.

The only abnormal condition, as I stated, is an internal squint and the terygium. I explained that.

Q. Any other trouble that you heard of, you simply had his word for? A. Absolutely.

An internal squint is the turning of the eye in toward the nose; it is the simplest definition I can give. An internal squint sometimes comes from a blow, not always. The most frequent occurrence of squint is a congenital condition. Most cases are born that way. The presence of the squint is no evidence of injury unless you have fissures that go with it. Terygium is a fold of the loose tissues of the eye growing over the cornea. When you move the lid of the eye, [114] you see a little tissue there, a mucus membrane, and that grows over the cornea. It is very slow in its progress, usually, sometimes many years and sometimes it may develop within a comparatively short time, four or five years. Terygium does occasionally occur. I don't think in this instance that will follow. Say an ulcer of the cornea; some abrasion of the cornea. In this instance I don't believe it resulted from any trauma.

(Testimony of B. F. Hardridge.)

Q. Now, in the statement that you gave that the Court requested, and again in answer to counsel for the other side, you stated to the jury that you were unable to standardize this man's vision. Tell what degree of vision he possessed in his left eye. Now, will you state to the jury, if you can, why you were unable to do that?

A. I was unable to get a response from the gentleman to my questions.

Q. In order to apply the tests that you refer to?

A. Yes, sir.

Q. In order to get the degree of vision, or standardize the vision, it is necessary that there at least be some co-operation from the patient, is there?

A. Yes, sir.

Q. Had he answered the questions that you asked, responded to inquiries as you applied the tests, you are fully able to determine what that vision is, [115] are you not?

A. If the patient co-operates, certainly.

Q. It does require a degree of co-operation?

A. Yes, sir.

Q. And which you were unable to obtain from this man?

A. Yes, sir; as I explained, the first man that sees such a case as that, he is in a position to get good information, and a patient acquires a knowledge of techniques very readily. This man has been seen perhaps many times, which made it very difficult to determine.

(Testimony of B. F. Hardridge.)

Q. The oftener he is examined, the better he becomes educated?

A. Tests should be applied very quickly, and does not attract any attention.

Q. As to the vision of the left eye, you can only say that he sees some with that left eye?

A. I can only say that he sees some, indicated by the action of the iris to light, and the fact that the pupils are the same size. I am also led to believe so by reason of his absolute refusal when the eye is put to a confusion test before his eyes, to answer.

Q. In that test—you also applied a test where he claimed not being able to see light. What was the name of that test, Doctor? I think two tests where he was. [116]

A. That is the Jackson Fogging Test.

Q. Now, could or could not his answers have been true to that case? A. I didn't get the question.

Q. When he told you at the time of that test that he could not even see light, could his answer have been true?

A. No, that answer was absolutely wrong, because he had nothing but a plain glass to look through with his good eye, yet he absolutely refused to admit that he could see light, let alone any figures. I am referring to his good eye.

Q. Now, did he give any other answers, Doctor, which you are able to state to the jury were false?

A. In all of those confusion tests, he would not respond to those tests which I described, the carrying of the point of a match to the left of the median

(Testimony of B. F. Hardridge.)

line, twelve inches from the base of the nose, he denied being able to see it, and yet he fixed with his right eye, mark you, I am not speaking of the injured eye.

Q. Yes?

A. With the right eye, indicating, of course, that he was misleading me.

Q. It could not have been correct?

A. Oh, absolutely no.

Q. And there was a test where he refused to walk, claiming he was unable to walk?

A. Yes, sir. [117]

Q. Could that inability have been real, under the circumstances?

A. Well, I don't know. He did not walk, that is all I can say.

The COURT.—Were you speaking through an interpreter, Doctor?

The WITNESS.—Yes, sir.

The COURT.—The court interpreter, here?

The WITNESS.—Yes, sir.

I was in all about three hours examining him. I never comment at all in examining a patient. I make that a rule always to show no comment. If they fall down, it is up to the patient. So far as I was able, under the circumstances, to examine the patient, I could see no injury in the eye. I might add that I had extreme difficulty in examining the patient. That part of the examination was rendered difficult by the condition of the light and his inability intentionally or unintentionally, of holding

(Testimony of B. F. Hardridge.)

his eyes so that I could see them. I tried for certainly an hour and a half to examine his eyes.

Examination by the COURT.

Q. Are you able, Doctor, to tell the Court and jury what, in your opinion, has brought about the condition of this plaintiff's left eye, if you can?
[118]

A. I am not able to state clearly what brought this condition about. It may have been congenital.

Q. That is, he may have been born with it?

A. Born with it. There are instances of muscular disturbances which is not determined until some determining factor may produce it. Whether that is true in this case or not, I don't know.

Examination by Mr. MATHEWS.

I am of the opinion that the vision in his left eye is distinctly under normal. I might qualify that by saying that such eye are embryonic. That is, very much less than normal. As to my opinion of his statement that he was wholly unable to see with his left eye, I will say, in a measure you have got to make some estimate of the mentality of the person in forming an opinion of that sort. We are all given to being misled, but I don't know that I just grasp what you mean. Whether intentionally or unintentionally, when he stated that he was wholly unable to see with his left eye, he stated something which I have now found is not correct. He may be deluded in his own mind. Whether he has stated conscientiously the truth or untruth, I don't

(Testimony of B. F. Hardridge.)

know. I know he has a certain amount of vision there. [119]

Examination by Mr. KEARNEY.

Q. You said that condition of the squint might be caused by some outside force other than the condition with which he was born. Can you say that the muscles—you said that the muscles in that eye might originate or might cause a squint from some outside force?

A. I said that there are instances. I didn't say that this was an instance.

It would be possible to bring it about by a trauma, such conditions have been produced by trauma, but there you have paralysis of the muscles. Here we have a weakness of the external muscles and not a paresis. A weakness is a muscle while good, but which soon tires out itself whenever force is supplied, where a muscle that has paresis or paralysis, there is a continued degeneration of the nerve supply to that muscle. That will never recover.

I did not detect any evidence of blows or tenderness other than normal. He did not wink when I touched his eye, showing no evidence of pain. I did not say he could not keep his eye open; I said that he would not. I don't know the cause of his not doing so. If I examined a man's eyes three hours constantly, it would tire his eyes, but his eyes were not examined three hours constantly; I said I spent [120] three hours with this man. It was abso-

lutely necessary in order to carry on this work that I give him a rest between. I don't know what the intervals of rest were.

Mr. KEARNEY.—That is all.

And this was all the evidence introduced upon the trial of said issues.

Thereupon, defendant requested the Court to charge the jury as follows, which the Court refused, the defendant saving an exception.

Gentlemen of the jury, the law of this State permits the plaintiff in a case of this kind to object to the testimony of any physician who may have examined or treated him, as to what he told such physician about his ailments, or as to what the physician himself discovered by his examination of the plaintiff. The law does not require the plaintiff to make any such objection, but leaves him free to make it or not make it, as he sees fit. If he does make the objection, the Court is required to sustain it. In this case, the testimony of certain physicians has been offered by the defendant corporation, and has been objected to by the plaintiff, and this testimony has been excluded, not because the Court was unwilling to admit it, but simply because the plaintiff objected to it, and the Court, under [121] the law, was required to sustain the objection. The fact that the plaintiff has made the objection, and has thereby kept these physicians from testifying is a fact to be considered by you in weighing the plaintiff's own testimony, and in judging of the truth of the story he tells.

Thereupon, the Court charged the jury as follows:

Gentlemen of the jury, this is an action brought by the plaintiff against the defendant to recover the sum of twenty thousand dollars for an alleged personal injury he claims to have received while in the employ, and while doing work for the defendant. The plaintiff's complaint has been read in your presence and hearing, and I believe it is unnecessary to again read it. You will probably remember what the material allegations are.

The defendant denies the allegations of plaintiff's complaint, and thereby the issue is made, and the burden is upon the plaintiff to prove his case as alleged in his complaint.

As has been told you by counsel, you are made the sole judges of the facts in the case, and of the credibility of each and all of the witnesses who have testified in the case, and as to what weight you [122] will give to the testimony of the several witnesses. In determining the credibility of any witness, and the weight you will give to his testimony, you have the right to take into consideration, and you should take into consideration the manner and appearance while giving his testimony; his means of knowledge; any interest or motive which he may have in the result of the case, if any be shown, and the reasonableness and probability of the truth of his statements when considered in connection with all the other facts in the case. If you believe that any witness has wilfully sworn falsely to any material fact in the case, it is within your province

to entirely disregard the testimony of such witness except in so far as he may be corroborated by other credible evidence in the case, or by the facts and circumstances in evidence. And when I speak of the witnesses, I mean to include the plaintiff, because the plaintiff has offered himself as a witness in his own behalf. You will take his testimony as you would that of any other witness, taking into consideration the fact that he is interested in the result of the case, and determine whether or not that interest in anywise affects his testimony, or causes him to be biased, or has caused him to overstep the truth, or withhold the truth. The same rule may be followed in determining what, if any, credence you will give to the testimony of any of the witnesses for the defendant. You will not disregard the testimony [123] of the plaintiff merely because he is the plaintiff, nor should you disregard the testimony of the witnesses for the defendant, or such of the witnesses for the defendant as are employees, merely because they are such, and it will be your duty in this case in arriving at a verdict to be governed by the facts, the evidence and the law, regardless of the fact that the plaintiff is an individual and a poor man, and that the defendant is a corporation and the owner of large properties, if it is a fact—regardless of the condition of the parties financially, and regardless of the effect of your verdict upon the parties or either of them.

Before a verdict in any amount can be rendered in favor of the plaintiff, and against the defendant, he must establish by a preponderance of the evidence

—that is, the greater weight of the evidence—first, that the accident by him complained of actually occurred, and was due to a condition or conditions of his occupation. And second, that the accident was not caused by his negligence. If you do not find that there was an accident, as he claims, then you stop right there, and you need not go any further in the case at all. Now, by “the burden of proof,” wherever used in these instructions, and I tell you the burden of proof is upon the plaintiff, and that is always the case where the plaintiff brings a suit—by “burden of proof,” I say is meant that the party upon whom the burden of [124] proof devolves must prove the allegations of his contention by a preponderance of evidence. That is, by the greater weight of evidence. It does not mean necessarily that there shall be a greater number of witnesses on the one side than the other, but it means of the more convincing force.

Now, this action has been brought under what is known as the Arizona Employers’ Liability Law. Under the provisions of this act, and under this act alone, can the plaintiff recover in this action. If he does not bring himself within its provisions, then, regardless of the fact that he may bring some other kind of an action, he cannot recover in this case. It makes no difference whether he might recover under the Workman’s Compensation Act, the common-law act or negligence, but he has elected to bring his action under this law, and under this he must make good his contention. Now, under the provisions of that act, an employer in certain dan-

gerous occupations, among them mining, is liable for the personal injury of an employee for an act arising out of and in the course of such dangerous and hazardous employment, and due to a condition or conditions of such employment in all cases in which the injury of such employee shall not have been caused by the negligence of the employee injured. I charge you as a matter of law that the occupation of the plaintiff, that of mucker or miner, whichever he was at the time he was employed by the defendant, is [125] a dangerous occupation within the meaning of this Employers' Liability Law. Now, the first question then to determine is whether or not the plaintiff at the time and place mentioned in his complaint, and as alleged therein, did receive injuries to his eye as he claims. That is, he alleges that he received it a result of a blow, and he sets forth in his complaint how that occurred. It is for you to determine, as I said before, whether or not any accident did occur, and how it occurred, if at all, and if an accident did occur, then whether or not it was as he has alleged in his complaint, and if such did occur, whether or not that accident caused any injury to his left eye as he complains of in the complaint. Now, if you believe that he was so injured, and that it was caused or suffered by reason of an accident, and such an accident as is set forth in his complaint, then you must consider and determine whether or not it was caused by his negligence, because if it was caused by his negligence, he, of course, could not recover under this particular law. Now, if you find from the testimony, and from

that alone, that the plaintiff, at the time and place mentioned in his complaint, sustained the injury set forth in his complaint, and that such injury was not the result of his negligence, then, and not until then, you would proceed to consider the nature and extent of his injury. Now, as I said before, the injury for which you award damages to the plaintiff, [126] must, by a preponderance of the evidence, be shown to have been sustained as a natural and proximate result of such accident, if one took place.

Now, as stated, you are the sole judges of whether there was an accident, and whether the accident was such as is complained of by the plaintiff in his complaint, and also as to the extent and the degree of the injury, if any was sustained. That is, whether or not it was permanent in character, and as to what extent, if any, by reason of such injury, the plaintiff has suffered physical pain and anguish, or both, and also as to what extent, if at all, he has, by reason of such injury, he has been disabled and incapacitated from following his usual vocation as described in the complaint, and whether or not he is incapacitated from following any other occupation by reason of the loss of one of his eyes.

If you find that the plaintiff is entitled to recover, the amount of the recovery, if any, is for you to determine from all the facts, circumstances and conditions. Of course, you cannot measure in dollars and cents the exact amount to which he is entitled, but it is for you to say, in the exercise of sound discretion, from all the facts, after considering and hearing all the evidence produced before you, with-

out fear and without favor, without partiality or any consideration of the result of the verdict, and without passion or prejudice, what amount of money will reasonably compensate [127] him for the damages, if any, he has sustained. In the ascertainment of damages, the law does not lay down any definite mathematical rule. It says that you, the jury, must be governed by sound sense and good judgment, and make such award of damages, if any, as would be just compensation.

The American Mortality Tables have been introduced by the plaintiff in this case. These tables may only be considered in the event you determine that there was an accident, and that there was a permanent injury. They are never to be considered in cases where the injury is temporary only. Now, in order to give you some idea as to the value of those tables, I will read you what has been said on the subject: "The expectancy of life is ascertained by the average mortality of large numbers, and for convenience these averages are gathered into tables called Life or Mortality Tables. They are permissible in evidence whenever the possible duration of a person's life is material in the case. In actions for personal injury, when the injury is of a permanent character, and in actions for death by wrongful acts, in estimating damages, the expectancy of life of the person injured is an essential element, and to show such expectancy, standard mortality tables are admissible in evidence." If the plaintiff were in a more hazardous employment than the persons from whom the tables were made, it is a circum-

stance to be taken into consideration by the jury as tending to show that his expectancy of life was less than the tables would [128] indicate to one injured by reason of his hazardous occupation, but the tables are none the less admissible on that account. The tables are not conclusive upon the question of the duration of life, but are competent to be weighed with other evidence, such as the physical condition of the person, the general health, his vocation in life with respect to dangers, his habits, and other facts that would probably enter into the probable duration of his life. Whether there is any definite rule in making that estimate or calculation in Mexico, or any difference in the duration of the life of a person of Mexican birth, I don't know, and I will leave that for you to determine. I have been furnished with no information on the subject, and as I said before, these are American Tables. If you have in your experience or observation anything which will enable you to more easily determine the matter, you may consider it in connection with the tables, and all the other elements in the case. And as above stated, if you find for the plaintiff, you should award a fair and reasonable compensation, taking into consideration what the plaintiff's income was at the time of the injury, what it was before that time, if shown, what it would probably have been in the future, how long it would last, whether it was likely he would accumulate anything at the wages he was receiving, or whether he would be steadily employed, or whether he would become [129] ill and thereby lose wages by reason of such illness; whether or not previous

to this injury he had been ill or lost any time, and if so, the cause of the sickness or illness, and are to consider all contingencies to which he was liable.

Something has been said in this case, gentlemen, with reference to certain testimony offered by the defendant. Counsel for both plaintiff and defendant have referred in argument to the testimony of certain physicians. The plaintiff in this case has testified that while he was in the employment of the defendant, he received a certain injury to his eye; that thereafter he consulted a physician regarding such injury, and received certain treatment. The defendant then offered the testimony of those physicians, or some of them, which, under the law, the defendant had a right to do. That evidence would have been admissible, and is admissible under the law, and they had the right to offer it, unless the plaintiff objected to it. The plaintiff did object to this testimony, which, under the law, he had the right to do on the ground that the testimony of such witnesses was privileged, and the law on that question is that a physician or surgeon cannot be examined without the consent of his patient as to any communication made by his patient with reference to any physical or supposed physical disease, or any knowledge obtained by personal examination of such patient, provided, that is, the person offers himself [130] as a witness and voluntarily testifies with reference to such communication, that is to be deemed a consent to the examination of such physician or attorney. I say that the defendant company was within its rights in offering this testimony, and

had there been no objection, it would have been admissible and legal testimony. On the other hand, the plaintiff had the right, if he saw proper to do so, had the legal right to object to such testimony being offered to the jury under the statute which I have read to you, and in doing so, he was within his rights, and the objection was sustained and the evidence was excluded, and that is all there is to it.

Now, if from all the facts in the case, and the law as I have stated it to you, you come to the conclusion that the plaintiff sustained the injury that he complained of at the time and place alleged in the complaint, I say, if you come to that conclusion, and come to the conclusion that he is entitled to recover some amount for such injury, you must not render a quotient verdict. That is, you must not add together the amounts or sums each of you believe he is entitled to and divide it by twelve or any other number. Such or any similar method of arriving at his compensation would not be in accordance with law. That does not mean that if you come to the conclusion that he is entitled to compensation that you may not express your ideas on that subject, but it means that [131] you must not arrive at it by adding together the several sums and dividing them by twelve. That is known as a quotient verdict. Now, all of you have heard of it and read of it, and such a verdict should never be rendered in any case.

Now, in arriving at a verdict in this case, if you come to the conclusion that the plaintiff is entitled to any compensation at all, you have no right to

say, "I would not lose my eye for twenty thousand dollars," or "I would not have lost my eye for ten thousand dollars," or any other sum. That is not the proper method of arriving at damages. Perhaps a man would not take a million dollars for one of his eyes. Perhaps he would not have his arm taken off, if he were a normal man, for a million dollars, but that is not the question. Certain people, as the progress of the world continues, have got to engage in those hazardous occupations. The policy of the law is that if a man receives an injury working for corporation or for an individual, so far as that is concerned, because this law applies to individuals as well as corporations, and if one of you owning a mine and hiring men in hazardous occupations, you are liable under this law just as a corporation, therefore the policy of the law is that if a corporation or an individual desires to engage in a hazardous occupation, he is responsible for all expenses which arise in and growing out of the conduct of such business; the operation of such business in all cases in which the injury [132] was not caused by the plaintiff's own negligence. And if such accidents occur, and if such injuries are sustained for which damages are to be awarded, they should be such damages as are compensation for the injuries received. They cannot, under the law, be awarded in the way of punishment against an individual or a corporation, and if you find a verdict for the plaintiff in this case, you should find a sum which would be just compensation for the injury sustained. No more; no less.

If you find for the plaintiff, the form of your verdict will be, "We, the jury, duly impaneled and sworn in the above-entitled cause, do find for the plaintiff, and assess his damages at" so many dollars, inserting therein the amount for which you find for him. If you find for the defendant, the form of your verdict will be, "We, the jury, find for the defendant," and have that verdict signed.

Now, should you not agree on a verdict, by six o'clock, the marshal will order your dinners, and later go to bed in such place as he may have arrangements made, and you must not separate. Under the law, after a case goes to the jury, the jury must not separate without the consent of both plaintiff and defendant and the Court.

Any exception on the part of the plaintiff?

Mr. KEARNEY.—We have none. [133]

The COURT.—Any on the part of the defendant?

Mr. MATHEWS.—None to the charge given, your Honor, but we request an exception to the Court's failing to give our requested instruction.

The COURT.—I think I covered that in the main charge.

Mr. MATHEWS.—I would ask that I may have an exception.

The COURT.—You may have an exception. That is all, gentlemen; you may go to the jury-room.

Thereupon the jury retired to consider their verdict and thereafter the said jury returned into

open court and rendered their verdict in favor of plaintiff.

Thereafter, defendant moved the Court to grant it a new trial on the following grounds, to wit:

I.

That the Court erred in holding that the plaintiff had not waived the privilege as to the communications between the defendant's witness, Doctor H. W. Rice, and the plaintiff, and that the matters sought to be elicited were privileged.

II.

That the Court erred in holding that the privilege had not been waived by the examination of the [134] defendant's witness, Dr. H. W. Rice, nor by the testimony of the plaintiff.

III.

That the Court erred in holding that the relation of physician and patient existed between the defendant's witness, Dr. J. B. Gray and Dr. D. W. Detweiler and Dr. H. H. Starke.

IV.

That the Court erred in holding that the matter sought to be elicited from each of said witnesses was privileged.

V.

That the Court erred in holding that the burden of proving such relation did not exist was on the defendant.

VI.

That the Court erred in changing the order of proof and holding that the examination of plaintiff as to the relation between the plaintiff and the de-

fendant's witness, Dr. J. B. Gray, was a part of plaintiff's case in rebuttal and not plaintiff's case in chief. [135]

VII.

That the Court erred in passing on a question of fact and taking it from the jury.

VIII.

That the Court erred in weighing the evidence and determining the credibility of the witnesses.

IX.

That the Court erred in holding the evidence to be evenly balanced on the question presented.

X.

That the Court erred in excluding the testimony offered after holding that the evidence was evenly balanced.

XI.

That the Court erred in excluding the evidence offered after defendant had made a *prima facie* showing that the relation of physician and patient did not in fact exist between the defendant's witness, Dr. H. B. Gray, and the plaintiff.

XII.

That the Court erred in holding the question presented to be one of admissibility or competency [136] and not of weight or credibility.

XIII.

That the Court erred in, in effect, depriving defendant of its entire defense by changing the order of proof and placing the burden of proof on defendant.

XIV.

That the Court erred in refusing and failing to give the instruction to the jury as requested by defendant.

But the Court overruled said motion for new trial, to which ruling of the Court, defendant then and there excepted.

And defendant, having tendered this, its bill of exceptions, and having prayed the Court to allow and sign and seal same, and said bill of exceptions having been examined by the Court and found correct, the same is accordingly allowed, signed, sealed and made a part of the record this 31st day of August, 1920.

WM. H. SAWTELLE,
United States District Judge. [137]

In the District Court of the United States for the
District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corpora-
tion,

Defendant.

Certificate of Judge and Stipulation of Counsel.

Due service of the foregoing bill of exceptions in the above-styled cause is hereby admitted, and it is hereby stipulated and agreed that the said bill of exceptions is settled between counsel as a true

bill of exceptions in said cause, this 30th day of August, 1920.

L. KEARNEY,
JAMES R. DUNSEATH,
Attorneys for Plaintiff.
ELLINWOOD & ROSS,
JOHN E. SANDERS,
JAMES S. CASEY,
Attorneys for Defendant. [138]

I, William H. Sawtelle, Judge of the United States District Court for the District of Arizona, hereby certify that the foregoing bill of exceptions in the above-styled cause is a true bill of exceptions.

WM. H. SAWTELLE,
District Judge.

[Endorsements]: Epifanio Guerrero, Plaintiff, vs. Phelps Dodge Corporation, a Corporation, Defendant. Bill of Exceptions. Filed Sep. 1, 1920. C. R. McFall, Clerk United States District Court for the District of Arizona. [139]

In the District Court of the United States for the District of Arizona.

EPIFANIO GUERRERO,
Plaintiff,
vs.

PHELPS DODGE CORPORATION, a Corporation,
Defendant.

Petition for Writ of Error.

To the Honorable WILLIAM H. SAWTELLE,
District Judge:

The above-named defendant, feeling itself aggrieved by the final judgment herein entered against it and in favor of the above-named plaintiff on the 14th day of May, 1920, prays that a writ of error be allowed to defendant, from the United States Circuit Court of Appeals for the Ninth Circuit, to review said final judgment, and that such writ of error be ordered to operate as a supersedeas, upon defendant giving such security as may be required.

ELLINWOOD & ROSS,
JOHN E. SANDERS,
JAMES S. CASEY,
Attorneys for Defendant.

[Endorsements]: Epifanio Guerrero, Plaintiff, vs. Phelps Dodge Corporation, a Corporation, Defendant. Petition for Writ of Error. Filed Sep. 1, 1920. C. R. McFall, Clerk United States District Court for the District of Arizona. [140]

In the District Court of the United States for the
District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corpora-
tion,

Defendant.

Assignment of Errors (Copy).

Comes now the above-named defendant and makes and files this, its assignment of errors, upon which it will rely on the prosecution of its writ of error to review the judgment herein rendered on the 14th day of May, 1920.

I.

The Court erred in sustaining plaintiff's objection to defendant's cross-examination of plaintiff, and excluding the answers elicited by such examination, by which defendant proposed to show that the plaintiff's left eye was not in the condition plaintiff testified that it was, and that plaintiff did not state such to be its condition when his left eye was examined by the defendant's witness, Dr. H. W. Rice; that any communication made [141] by the plaintiff to the defendant's witness, Doctor H. W. Rice, or any examination made by such physician, was not with reference to any physical or supposed physical disease of plaintiff. For this purpose, the defendant propounded the following question and the following discussion ensued:

Q. Did you tell Doctor Rice that you could not see in that eye when you went to him?

Mr. KEARNEY.—I object to that question as privileged.

The COURT.—Objection sustained on the ground it is a privileged communication, and it cannot be called for if the plaintiff objects to it.

Mr. MATHEWS.—This is not the time I expected to reach the question, your Honor, but perhaps it may as well be presented now as any other time. The plaintiff in this case, on examination of his counsel has already voluntarily described not only his acts in going to Doctor Rice, but the treatment Doctor Rice administered to him. It has been given in this testimony, on account of some water he says Doctor Rice put in his eyes being too strong. He says the doctor at Morenci, and afterwards identifies him as Doctor Rice. The record will show that he has testified voluntarily in answer to questions by his own counsel, not only that Doctor Rice treated him, but what the treatment consisted of; that he put water in his eyes that was too strong. While I recognize the rule that your Honor refers to, we submit that the door has been opened by counsel.

The COURT.—Well, frankly, I have the same views on the subject. In view of the fact that the evidence was called for by plaintiff's counsel, and I [142] must confess that I don't know at this time whether calling for

that evidence opens the door to your cross-examination as to verbal statements made or not. It would seem that if the plaintiff calls for a part of what took place, that the defendant might be entitled to know all that took place. If the plaintiff had not told anything about the treatment that he received, or the fact that he was treated at all, but may have testified as to the injury, and then called physicians and had them testify as to the result of the injury, that would be a different proposition, but they elected to go further than that, and to testify to the treatment, as to the character of the treatment that he received. It is an unusual situation, and it is an entirely new question, but I prefer, under the circumstances, to permit you gentlemen to look into the question and see whether or not you can find any authorities on the subject, and I will permit you to recall this witness for the purpose of again propounding that question to him, in the event it is held by the Court to be admissible, notwithstanding the fact that in the meantime they may have finished their testimony and closed their case.

Mr. MATHEWS.—For the present, the objection is sustained?

The COURT.—Yes.

Mr. MATHEWS.—May the record show our exception, your Honor.

The COURT.—Yes.

II.

The Court erred in sustaining plaintiff's objection to the testimony of the defendant's witness, Doctor H. W. Rice, and excluding such testimony [143] offered by defendant by which defendant proposed to show that the plaintiff's left eye was not injured as the plaintiff testified, was not in the condition described by plaintiff in his testimony; that plaintiff, in fact, had sustained no injury to his left eye as a result of the accident described by him in his testimony; that the sight of such eye was in no way affected or impaired by such accident; that any communication made by the plaintiff to the defendant's witness, Doctor H. W. Rice, or any examination made by such physician was not with reference to any physical or supposed physical disease of the plaintiff, and that the relation of physician and patient did not in fact exist between the defendant's witness, Doctor H. W. Rice, and the plaintiff. For the purpose of eliciting this testimony, defendant propounded the following question and the following discussion ensued:

Q. When he first came to you on that afternoon in the latter part of January, 1919, complaining of the eye injury, when you first examined him, what did you find?

Mr. KEARNEY.—We object; it is a privileged communication.

Mr. DUNSEATH.—Privileged communication.

Mr. MATHEWS.—We have the same question that was presented a moment ago. I presume we will be permitted to present any authorities we may have in regard to the matter. [144]

The COURT.—Yes; the plaintiff has permitted you without objection to go this far.

Mr. DUNSEATH.—I believe the only question was about seeing him and making an examination.

The COURT.—No; he has gone into the fact that he has treated him.

Mr. KEARNEY.—He does not testify to any treatment.

Mr. MATHEWS.—I would suggest that we do not think this question is objectionable. It refers, not to an oral communication made by the plaintiff, but to something which the doctor himself found in the course of his examination and treatment, about which examination and treatment the plaintiff himself has testified voluntarily, going to the extent of telling in part what that treatment consisted of, and actually complaining before the jury of what the doctor did, criticising and finding fault with him, and we contend clearly that under that state of the record that plaintiff himself has swept away his privilege and opened the door to us to have the doctor give the whole thing rather than be confined to the one-sided statement of the plaintiff.

The COURT.—There is no doubt about this being a privileged communication, and the only

question is whether you have or have not yourselves opened the door for the introduction of that testimony by going as far as you have in the examination of the plaintiff, and also in allowing, without objection, the examination of this witness up to the time when they called for the actual oral conversation between them.

Mr. DUNSEATH.—The examination of this doctor has not proceeded to any extent whatsoever that it becomes a waiver of the privileged. We could [145] not consistently.

Discussion.

The COURT.—I will sustain the objection for the present.

Mr. MATHEWS.—We will ask the record to show our exception.

The COURT.—You may have an exception.

III.

The Court erred in sustaining the plaintiff's objection to the testimony of the defendant's witness, Doctor J. B. Gray, and excluding such testimony offered by defendant, by which defendant proposed to show that the plaintiff's left eye was not injured as the plaintiff testified, was not in the condition described by plaintiff in his testimony; that plaintiff, in fact, had sustained no injury to his left eye as a result of the accident described by him in his testimony; that the sight of such eye was in no way affected or impaired by such accident; that any communication made by the plaintiff to the defendant's witness, Doctor J. B. Gray, or any examination made by such physician was not with reference to

any physical or supposed physical disease of the plaintiff, and that the relation of physician and patient did not in fact exist between the defendant's witness, Doctor J. B. Gray, and the plaintiff. For the purpose of eliciting this testimony, [146] the defendant propounded the following question and the following discussion ensued:

Q. What sort of an examination did you put the plaintiff through?

Mr. DUNSEATH.—We object to the question on the ground it is privileged.

The COURT.—Objection sustained.

Mr. MATHEWS.—I would like to be heard on that.

The COURT.—All right, I will withdraw the rule and allow you to be heard.

Mr. MATHEWS.—The point here is a new question, so far as I know, and it has not been raised previously in any other case in this court. We have here a situation where the relation of patient and physician within the meaning of the statute, does and did not exist. The situation is exactly similar to that which would exist where a prospective employee comes to a prospective employer and under the rule submits himself to a physical examination to enable the prospective employer to know whether he is physically fit to work; that that is the sole purpose of the examination. Not being that of medical treatment, but to secure information for the employer for his use in determining this very fact. That is frequently the case, and I

recall one instance at least where such testimony was permitted in this court, the testimony of a physical examination, upon application for employment. The theory of it is that there is no relation of physician and patient in the ordinary sense. But the situation is one where a person who is examined voluntarily submits himself to a physician in order to enable the third person to know something of the condition which he otherwise would not be able to ascertain for himself. We have here precisely the same sort of [147] situation. The purpose may be a different purpose, but the situation, so far as I can see any legal distinction, is similar. We have here a man who has been an employee and has received or claimed to have received an injury, and he is negotiating with his employer seeking some sort of a settlement, and the employer desires to know what the true condition of that man is for his own information and guidance in making a settlement or refusing such a settlement, and that purpose, if fully explained to the employee, the person supposed to be injured, and the arrangement has been made by mutual consent between the employee and the employer whereby a physician may be used, and that with the understanding that the information obtained by the physician shall be communicated to the employer; made known to him for the very purpose of possible settlement, or possible negotiations. Now, if there is any element of confidence to that, it

does not occur to me. It is not the relation of patient and physician any more than he was able to go to some other place and have this examination made. Suppose he went to some physical director or some athletic trainer and said, "I want you to measure me for such and such a thing; I want you to determine certain things about my body, and my size, etc., because another man wants it, and I want him to have it, and I am willing that he should have it." There would be absolutely no relation of physician and patient as ordinarily understood. It just happens in this case that the person who is able to get this information, and who both parties desire to go and get the information is a physician. His ability depends upon the fact that he has expert medical knowledge, and the testimony of Mr. Hodgson, coupled with the testimony already given by Dr. Gray shows absolutely no relation of physician and patient existed in this case. The privilege [148] never existed, and it could not have been intended to have existed. I think that the privilege is waived, if one ever existed, when I say, "All right, I will go to a doctor and let him examine my eye or anything else about me; I will let him examine me with reference to an injury or supposed injury for the purpose of enabling you to know those things about me which you are now not thoroughly satisfied about." Now, if there is going to be a question of privilege raised, certainly I waive that privilege when I

give that consent. I think the true theory of it was that the relation of patient and physician never existed. There was no understanding that there was to be any treatment in this case. As to the other physician, Doctor Martin, Mr. Hodgson testified he sent him there for examination and possible treatment. Not so here in this case. It was solely a matter of obtaining information about this man. He might have said, "No, I will not submit to it. I will let you find out the best way you can," but he says, "All right, I will go." He did not take advantage of that. He says, "If you will pay the expenses, arrange for some doctor specialist in this line, give me the money to go down there, I will go and submit myself so that you may have the information which you have not now, and then perhaps we will be able to arrive at some settlement or something. You will have the facts more to your satisfaction." I can't see that the confidential relation or possible privilege could grow out of that.

The COURT.—I think the Court should know whether there was such a relation at the time, and I suppose that it would only be fair to the defendant for the plaintiff to testify as to his understanding, whether he did so agree before ruling on that. [149]

Mr. KEARNEY.—Shall we put the plaintiff on the stand and examine him a little bit?

The COURT.—I think so.

EPIFANIO GUERRERO, being recalled by

counsel for the plaintiff, by permission of the Court, and having been heretofore duly sworn, through the interpreter, testified as follows:

Direct Examination by Mr. KEARNEY.

Q. When you went to El Paso, what did you understand you were going there for? Did you understand that you were going there to have your eye treated?

Mr. MATHEWS.—Your Honor, we object to that.

The COURT.—The first part of the question is perfectly proper, I think, but the latter part of it is objectionable. His understanding of what he was going there for is proper.

Q. What did you understand you were being sent to El Paso for?

A. To benefit my eye; it would do my eye some good.

Q. Did you believe when you went there that you were to receive treatment for your eye, or try to better your eye or not?

A. Yes, sir; with that intention.

Q. You went there for the purpose of receiving some benefit to your eye?

A. Yes, sir; most assuredly. How would I be in this fix?

Q. Did you pay hospital fees when you worked for the company? A. Yes, sir.

Q. And that goes to help keep up the hospital by the doctors there?

The COURT.—I want to know if there was

any understanding between this witness and any officer of the company [150] at the time he left.

Mr. KEARNEY.—He says now, to get a better eye.

The COURT.—You may cross-examine him, if you so desire.

Cross-examination by Mr. MATHEWS.

You only stayed in El Paso one day, I believe you testified?

A. The day I left, the doctor sent me to El Paso, and I got there at two forty and I went to the doctor right away, and I left there the next day.

Q. They did nothing to you but examine you, did they? A. That is all.

Q. You came back as soon as he examined you, did you?

A. Yes, sir, sure; I was going down on some business.

Mr. MATHEWS.—No further cross-examination.

Redirect Examination by Mr. KEARNEY.

Q. Did you believe that the doctor that you saw at El Paso was acting with the doctors at Morenci?

Mr. MATHEWS.—That is objected to on the ground it is irrelevant. What this man believed since, founded upon some unreasonable ground, is not competent. He may believe anything. The true situation here is whether or

not this arrangement that Mr. Hodgson has sworn to occurred here. That has not been contradicted so far by anybody.

The COURT.—I will ask him myself.

Q. What, if any, conversation did you have with Mr. Hodgson, the gentleman who just testified here, with reference to your going to El Paso? A. Nothing. [151]

Q. Did, or did he not, request—did you not request of him or the company a settlement for the injury to your eye? A. Yes, sir.

Q. Did he or did he not tell you that if you would go to El Paso to be examined by a specialist, an eye specialist, and that specialist made a report to the effect that you had such an injury, that he would settle with you?

A. No, sir; he did not tell me anything.

Q. Did you have any conversation with him to the effect that you would go down there and be examined, have your eye examined by the El Paso specialist and that if that surgeon should be permitted to make report to him as to the condition in which he found your eye?

A. No, sir, I have never been to El Paso after that.

Q. After what?

The INTERPRETER.—I will ask that question again.

The COURT.—All right.

The WITNESS.—No, sir.

Q. Was it your purpose, and the purpose of the company's officer to obtain a report from

the specialist in El Paso in order to enable him to determine whether or not he would settle with you for the injury to your eye?

A. Of the company, do you mean?

Q. Yes.

A. He only examined my eye, but he never told me anything.

Q. Was it agreed between you and Mr. Hodgson before you left Morenci that you should go down to El Paso and have your eyes examined and that that specialist should make a report to him, and if the report showed an injury, that he would settle with you for the injury? [152]

A. No, sir, he didn't tell me nothing.

Witness excused.

The COURT.—Well, the evidence in the matter being evenly balanced, I feel that I ought to sustain the objection.

Mr. MATHEWS.—This is a little unusual, your Honor. I take it that this testimony that the plaintiff has given at this point is positively rebuttal. It is not a part of his main case.

The COURT.—No, it is preliminary, to enable the Court to determine whether or not this testimony should be admitted, or whether it should be excluded because it is privileged.

Mr. MATHEWS.—I understand perfectly what is it for, but that is the way in which these things should come. The plaintiff puts in his case, and at least, the defendant has made a

prima facie case, or showing here, and a very strong one, that a certain state of facts existed which would take this case entirely out of the privileged communications. Now, in rebuttal—it does not matter when it happened—the plaintiff is permitted, out of order, to meet that *prima facie* showing and endeavor to overcome it.

The COURT.—Only for the purpose of enabling the Court to determine whether the doctors' evidence is privileged.

Mr. MATHEWS.—The plaintiff testified that he never knew that such a man as Hodgson existed, and naturally he would say he never had any such a conversation with him; but when we make this showing, we are entitled to put the testimony in on the face of this *prima facie* showing, and then if the plaintiff wants to attack this *prima facie* showing, he does it on rebuttal, and then, after the showing is presented, the [153] whole thing, under proper instructions, goes to the jury. But to say that while the *prima facie* showing that we have made here, and then right in the middle of the trial allow the plaintiff to come in and attack that, without letting us go through with our testimony, and then say because the testimony is conflicting, and in the opinion of the Court evenly balanced, that the rule should be made against the defendant, and the defendant will not be permitted to put the testimony in at all, seems to me rather hard.

The COURT.—Maybe you are right.

Mr. MATHEWS.—It strikes me. I don't want to bring in something here for the purpose of making an error, but it strikes me—it seems to me clear that it is like many, many other situations where *prima facie* showing are to be made first. That does not mean that it is final. It may be overcome later by the rebuttal, but if we make a *prima facie* showing, and put this in proper form, and then like anything else, or other situations, it is simply a matter for the jury, under the proper instruction from the Court what to do with this, in case they believe such and such a thing, and disregard it if they do not believe such and such a thing, and not a matter to be finally determined by the Court in its finding.

The COURT.—You object to it?

Mr. KEARNEY.—I object to it on the ground it is privileged.

The COURT.—I sustain the objection.

Mr. MATHEWS.—We ask that our exception be entered.

The COURT.—You may have an exception.

[154]

The Court erred in said ruling in holding:

(a) That the matter sought to be elicited was privileged.

(b) That the relation of physician and patient existed between the defendant's witness, Dr. J. B. Gray, and the plaintiff.

(c) That the burden of proving that such relation did not exist was on the defendant.

(d) In changing the order of proof and holding that the examination of plaintiff as to the relation between the plaintiff and the defendant's witness, Dr. J. B. Gray, was a part of plaintiff's case in chief and not rebuttal.

(e) In passing on a question of fact and taking it from the jury.

(f) In weighing the evidence and determining the credibility of witnesses.

(g) In holding the evidence to be evenly balanced on the question presented.

(h) In excluding the testimony offered after holding that the evidence was evenly balanced.

(i) In excluding the evidence offered after defendant had made a *prima facie* showing that the relation of physician and patient did not in fact exist between the defendant's witness, Dr. J. B. Gray, and the plaintiff.

(j) In holding the question presented to be one of admissibility or competency, and not of weight or credibility. [155]

(k) In, in effect, depriving defendant of its entire defense by changing the order of proof and placing the burden of proof on defendant.

IV.

The Court erred in sustaining the plaintiff's objection to the testimony of the defendant's witness, Doctor J. B. Gray, and excluding such testimony offered by defendant, by which defendant proposed to show that the plaintiff's left eye was

not injured as the plaintiff testified, was not in the condition described by plaintiff in his testimony; that plaintiff, in fact, had sustained no injury to his left eye as a result of the accident described by him in his testimony; that the sight of such eye was in no way affected or impaired by such accident; that any communication made by the plaintiff to the defendant's witness, Doctor J. B. Gray, or any examination made by such physician was not with reference to any physical or supposed physical disease of the plaintiff, and that the relation of physician and patient did not in fact exist between the defendant's witness, Doctor J. B. Gray, and the plaintiff. For the purpose of eliciting this testimony, the defendant propounded the following question and the following discussion ensued: [156]

Q. What part of the examination did you conduct, and what part did Doctor Detweiler conduct?

Mr. KEARNEY.—We object to that; it is privileged to him.

The COURT.—Sustained.

Mr. MATHEWS.—The defendant desires an exception.

The COURT.—Exception.

Q. Now, what—I will ask you this, and you need not be in a hurry to answer it, because the counsel on the other side will object. I don't want to waste time, your Honor.

The COURT.—You may ask the question.

Q. You need not be in a hurry with your

reply, doctor. Did you and Doctor Detweiler, or either of you, on this occasion make a test of the plaintiff to ascertain whether or not he really was blind in his left eye?

Mr. KEARNEY.—I object to that on the ground it is privileged.

The COURT.—I sustain the objection.

Mr. MATHEWS.—The defendant excepts.

Q. Now, one more question along that line, slightly different, your Honor. Did you and Doctor Detweiler or either of you on that occasion apply the scientific tests for the purpose of ascertaining whether or not the plaintiff's left eye was normal or abnormal?

Mr. KEARNEY.—We object to that question on the same ground.

The COURT.—Same ruling.

Mr. MATHEWS.—Same exception, Mr. Reporter.

Q. And on the same occasion did you also make an examination of the plaintiff's right eye? [157]

Mr. KEARNEY.—I object to that on the same ground.

The COURT.—Same ruling.

Mr. MATHEWS.—Same exception. We have no further examination. Just one more question.

Q. As a result of that whole examination made by yourself and Doctor Detweiler, did you reach a conclusion as to the condition of the plaintiff's eyes?

Mr. KEARNEY.—I object to that on the same ground.

The COURT.—Sustained.

Mr. MATHEWS.—Exception.

V.

The Court erred in holding that the matters sought to be elicited by defendant's question, "What sort of an examination did you put the plaintiff through?" propounded to the defendant's witness, Doctor J. B. Gray, as set forth in full in assignment of error numbered 3 herein, was privileged to the plaintiff.

VI.

The Court erred in placing the burden of proving that the relation of physician and patient did not exist between the defendant's witness, Doctor J. B. Gray, and the plaintiff, upon the defendant. [158]

VII.

The Court erred in excluding the testimony offered by defendant through its witness, Doctor J. B. Gray, as set forth in full in assignment of error numbered three herein, after holding the evidence as to the relation of physician and patient between defendant's said witness and the plaintiff to be evenly balanced.

VIII.

The Court erred in sustaining plaintiff's objection to the testimony of the defendant's witness, Doctor H. H. Starke, and excluding such testimony offered by defendant by which defendant proposed to show that any communication made by the plain-

tiff to the defendant's witness, Doctor H. H. Starke, or any examination of plaintiff by such physician was not with reference to any physical or supposed physical disease of the plaintiff. For the purpose of eliciting this testimony defendant propounded the following question:

Q. Now, I will put a question which will probably be objected to and the Doctor need not answer promptly until the objection is made. What did you find as a result of that examination?

Mr. KEARNEY.—Now, we object to that as privileged.

The COURT.—Objection sustained on the ground it is a privileged communication.
[159]

Mr. MATHEWS.—Defendant excepts.

IX.

The Court erred in refusing and failing to give the following instruction to the jury, as requested by the defendant:

Gentlemen of the jury, the law of this State permits the plaintiff in a case of this kind to object to the testimony of any physician who may have examined or treated him, as to what he told such physician about his ailments, or as to what the physician himself discovered by his examination of the plaintiff. The law does not require the plaintiff to make any such objection, but leaves him free to make it or not make it, as he sees fit. If he does make the objection, the Court is required to sustain

it. In this case, the testimony of certain physicians has been offered by the defendant corporation, and has been objected to by the plaintiff, and this testimony has been excluded, not because the Court was unwilling to admit it, but simply because the plaintiff objected to it, and the Court, under the law, was required to sustain the objection. The fact that the plaintiff has made this objection, and has thereby kept these physicians from testifying, is a fact to be considered by you in weighing the plaintiff's own testimony, and in judging of the truth of the story he tells.

WHEREFORE, defendant prays that said judgment be reversed.

ELLINWOOD & ROSS,

JOHN E. SANDERS,

JAMES S. CASEY,

Defendant's Attorneys.

[Endorsements]: Epifanio Guerrero, Plaintiff, vs. Phelps Dodge Corporation, a Corporation, Defendant. Assignment of Errors. Filed Sep. 1, 1920. C. R. McFall, Clerk United States District Court for the District of Arizona. [160]

In the District Court of the United States for the
District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PEHELPS DODGE CORPORATION, a Corpora-
tion,

Defendant.

Order Allowing Writ of Error.

On motion of Ellinwood & Ross, attorneys for the above-named defendant, it is hereby ordered that a writ of error be allowed to defendant from the United States Circuit Court of Appeals for the Ninth Circuit, to review the final judgment herein entered against defendant and in favor of the above-named plaintiff on the 14th day of May, 1920, which writ of error shall operate as a super-seedeas, upon defendant giving security, as required by law, in the sum of Thirty-five Hundred (\$3500.00) Dollars.

Dated this 2d day of September, 1920.

WM. H. SAWTELLE,

District Judge.

[Endorsements]: Order Allowing Writ of Error. (Case of Epifanio Guerrero, Plaintiff, vs. Phelps Dodge Corporation, Defendant.) Filed Sept. 2, 1920. C. R. McFall, Clerk United States District Court, for the District of Arizona. [161]

In the District Court of the United States for the
District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corpora-
tion,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS,
that we, Phelps Dodge Corporation, a corporation,
as principal, and United States Fidelity & Guar-
anty Company, as surety, are held and firmly
bound unto Epifanio Guerrero, his heirs, executors,
administrators and assigns, in the sum of Thirty-
five Hundred Dollars (\$3500.00), for the payment
of which, well and truly to be made, we bind our-
selves, our successors and assigns, jointly and
severally, firmly by these presents.

Sealed with our seals and dated this 28th day
of August, 1920.

WHEREAS, the above-named Phelps Dodge
Corporation has prosecuted a writ of error from
the United States Circuit Court of Appeals for
the Ninth Circuit to reverse the final judgment
of the District Court of the United States for the
District of Arizona, entered in the above-entitled
cause on the 14th day of May, 1920;

NOW, THEREFORE, the condition of this
obligation is such that if the above-named Phelps

Dodge Corporation shall [162] prosecute its said writ of error to effect, and answer all damages and costs if it shall fail to make its plea good, then this obligation shall be void; otherwise to remain in full force and virtue.

PHELPS DODGE CORPORATION,

By E. E. ELLINWOOD,

Its General Attorney,

Principal.

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY,

By T. A. HUGHES, [Seal]

Its Attorney in Fact,

Surety. [163]

State of Arizona,

County of Cochise,—ss.

T. A. Hughes, being duly sworn according to law, deposes and says: The United States Fidelity & Guaranty Company is a corporation duly organized and existing under the laws of the State of Maryland, having power to guarantee bonds and undertakings in judicial proceedings. Said Company has fully complied with all the laws of the State of Arizona in that behalf and is duly authorized and empowered under the laws of said State to execute the foregoing bond as surety thereon. I have executed said bond as attorney in fact for said Company, being by said Company thereunto duly authorized.

(Signed) T. A. HUGHES.

Subscribed and sworn to before me this 28th day of August, 1920.

[Seal]

LOUIS C. RUPP,

Notary Public.

My commission expires July 13, 1924. [164]

The foregoing bond is hereby approved, both as to sufficiency and form, this 31st day of August, 1920.

WM. H. SAWTELLE,

District Judge. [165]

KNOW ALL MEN BY THESE PRESENTS:

That the United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, and having its principal office at the City of Baltimore, in the State of Maryland, does hereby constitute and appoint T. A. Hughes, of the City of Bisbee, State of Arizona, its true and lawful attorneys in and for the County of Cochise, for the following purposes, to wit:

To sign its name as surety to, and to execute, seal and acknowledge any and all bonds, and to respectively do and perform any and all acts and things set forth in the resolution of the Board of Directors of the said United States Fidelity and Guaranty Company, a certified copy of which is hereto annexed and made a part of this power of attorney; and the said United States Fidelity and Guaranty Company, through us, its Board of Directors, hereby ratifies and confirms all and whatsoever the said T. A. Hughes may lawfully do in the premises by virtue of these presents.

IN WITNESS WHEREOF, the said United States Fidelity and Guaranty Company has caused this instrument to be sealed with its corporate seal, duly attested by the signatures of its vice-president and assistant secretary, this 7th day of May, A. D. 1918.

.. UNITED STATES FIDELITY AND
GUARANTY COMPANY.

By (Signed) W. W. SYMINGTON,
Vice-president.

[Seal] (Signed) C. J. McFEE,
Assistant Secretary.

State of Maryland,
Baltimore City,—ss.

On this 7th day of May, A. D. 1918, before me personally came W. W. Symington, vice-president of the United States Fidelity and Guaranty Company, and C. J. McFee, Assistant Secretary of said company, with both of whom I am personally acquainted, who being by me severally duly sworn, said that they resided in the City of Baltimore, Maryland; that they, the said W. W. [166] Symington and C. J. McFee, were respectively the vice-president and assistant secretary of the said United States Fidelity and Guaranty Company, the corporation described in and which executed the foregoing power of attorney; that they each knew the seal of said corporation; that the seal affixed to said power of attorney was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that they signed their names thereto by like order as vice-president

and assistant secretary, respectively, of the company.

My commission expires the first Monday in May, A. D. 1920.

[Seal] (Signed) A. D. PATRICK,
Notary Public.

State of Maryland,
Baltimore City,—Sct.

I, Stephen C. Little, Clerk of Superior Court of Baltimore City, which court is a court of record, and has a seal, do hereby certify that A. D. Patrick, Esquire, before whom the annexed affidavits were made, and who has thereto subscribed his name, was at the time of so doing a notary public of the State of Maryland, in and for the city of Baltimore, duly commissioned and sworn and authorized by law to administer oaths and take acknowledgment of proof of deeds to be recorded therein. I further certify that I am acquainted with the handwriting of the said notary, and verily believe the signature to be his genuine signature.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the Superior Court of Baltimore City, the same being a court of record, this 7th day of May, A. D. 1918.

[Seal] (Signed) STEPHEN C. LITTLE,
Clerk of the Superior Court of Baltimore City.

[167]

COPY OF RESOLUTION.

THAT WHEREAS, it is necessary for the effectual transaction of business that this Company appoint agents and attorneys with power and au-

thority to act for it and in its name in States other than Maryland, and in the Territories of the United States and in the Provinces of the Dominion of Canada and in the Colony of Newfoundland.

THEREFORE, BE IT RESOLVED, that this Company do, and it hereby does, authorize and empower its President or either of its Vice-presidents in conjunction with its Secretary or one of its Assistant Secretaries, under its corporate seal, to appoint any person or persons as attorney or attorneys in fact, or agent or agents of said Company, in its name and as its act, to execute and deliver any and all contracts guaranteeing the fidelity of persons holding positions of public or private trust, guaranteeing the performance of contracts other than insurance policies and executing or guaranteeing bonds and undertakings, required or permitted in all actions or proceedings, or by law allowed, and

ALSO in its name and as its attorney or attorneys in fact, or agent or agents to execute and guarantee the conditions of any and all bonds, recognizances, obligations, stipulations, undertakings or anything in the nature of either of the same, which are or may by law, municipal or otherwise, or by any Statute of the United States or of any State or Territory of the United States or of the Provinces of the Dominion of Canada or of the Colony of Newfoundland, or by the rules, regulations, orders, customs, practice or discretion of any board, body, organization, office or officer, local, municipal or otherwise be allowed, required or permitted to

be executed, made, taken, given, tendered, accepted, filed or recorded, for the security or protection of, by or for any person or persons, corporation, body, office, interest, municipality or other association or organization whatsoever, in any and all capacities whatsoever, conditioned for the doing or not doing of anything or any conditions which may be provided for in any such bond, recognizance, obligation, stipulation, or undertaking, or anything in [168] the nature of either of the same.

I, C. J. McFee, Assistant Secretary of the United States Fidelity and Guaranty Company, hereby certify that at a regular meeting of the Board of Directors of said Company, duly called and held at the office of the Company, at the City of Baltimore, on the 11th day of July, A. D. 1910, at which was present a quorum of said Directors, duly authorized to act in the premises, resolutions were passed and entered on the minutes of said Company, of which resolutions the foregoing is a true copy and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of the United States Fidelity and Guaranty Company, this 7th day of May, A. D. 1918.

[Seal]

(Signed) C. J. McFEE,
Assistant Secretary.

I, C. J. McFee, Assistant Secretary of the United States Fidelity and Guaranty Company, do hereby certify that the above and foregoing is a full, true and correct copy of the original power of attorney given by said Company to T. A. Hughes, of Bisbee,

Arizona, authorizing and empowering him to sign bonds as therein set forth.

GIVEN, under my hand and the seal of said Company, at Baltimore, Maryland, this 7th day of May, A. D. 1918.

C. J. McFEE,
Assistant Secretary.

[Endorsements]: Epifanio Guerrero, Defendant, vs. Phelps Dodge Corporation, a Corporation, Defendant. Bond on Writ of Error. Filed Sep. 1, 1920. C. R. McFall, Clerk United States District Court for the District of Arizona. [169]

Writ of Error (Copy).

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judge of the District Court of the United States for the District of Arizona,
GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court of the United States for the District of Arizona, before you, between Epifanio Guerrero, plaintiff, and Phelps Dodge Corporation, a corporation, defendant, a manifest error hath happened, to the great damage of the said Phelps Dodge Corporation, as by its complaint appears, we being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this

behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done. [170]

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 2d day of September, in the year of our Lord one thousand nine hundred and twenty.

C. R. McFALL,

Clerk of the District Court of the United States for the District of Arizona.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that a copy of the foregoing writ of error was this day lodged in my office by Phelps Dodge Corporation, a corporation, plaintiff in error, for Epifanio Guerrero, defendant in error.

WITNESS my hand and the seal of said Court, this 2d day of September, 1920.

C. R. McFALL,

Clerk of the District Court of the United States for the District of Arizona.

[Endorsements]: Epifanio Guerrero, Plaintiff,
vs. Phelps Dodge Corporation, a Corporation, De-
fendant. Writ of Error. Filed Sep. 2, 1920. C.
R. McFall, Clerk United States District Court for
the District of Arizona. [171]

In the District Court of the United States, for the
District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corpora-
tion,

Defendant.

Citation on Writ of Error (Copy).

United States of America,—ss.

To Epifanio Guerrero, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Arizona, wherein Phelps Dodge Corporation, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected,

and why speedy justice should not be done to the parties in that behalf. [172]

WITNESS the Honorable WILLIAM H. SAWTELLE, United States District Judge for the District of Arizona, this 2d day of September, 1920.

WM. H. SAWTELLE,
United States District Judge.

Service of the foregoing citation is hereby acknowledged, this 8th day of September, 1920.

L. KEARNEY and
JAMES R. DUNSEATH,
Attorneys for Plaintiff.

[Endorsement]: Epifanio Guerrero, Plaintiff, vs. Phelps Dodge Corp., a Corporation, Defendant. Citation on Writ of Error. Filed Sep. 2, 1920. C. R. McFall, Clerk United States District Court for the District of Arizona. [173]

In the District Court of the United States, for the
District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corpora-
tion,

Defendant.

Praeipie for Transcript of Record.

To the Clerk of the District Court of the United
States for the District of Arizona:

You are hereby requested to prepare a transcript

of the record in the above-entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to the writ of error issued in said cause, and to incorporate into such transcript the portions of the record indicated below, to wit:

- (1) Plaintiff's complaint.
- (2) Defendant's answer.
- (3) Plaintiff's amended complaint.
- (4) Defendant's special demurrer to amended [174] complaint.
- (5) Plaintiff's motion to strike special demurrer to amended complaint.
- (6) Minutes of May 14, 1920, showing trial of issues, verdict rendered thereon and judgment entered pursuant to such verdict.
- (7) Motion for new trial.
- (8) Minutes of June 24, 1920, showing order overruling defendant's motion for new trial and defendant's exception to such ruling.
- (9) Bill of exceptions and attached stipulation.
- (10) Petition for writ of error.
- (11) Assignment of errors.
- (12) Order allowing writ of error.
- (13) Bond on writ of error.
- (14) Writ of error.
- (15) Citation on writ of error.
- (16) This praecipe and attached stipulation.

You are also hereby requested to annex to said transcript, and transmit therewith to the Clerk [175] of the United States Circuit Court of Ap-

peals for the Ninth Circuit, the original writ of error, the original assignment of errors, and the original citation, together with the acknowledgment or return of service annexed thereto.

Dated this 31st day of August, 1920.

ELLINWOOD & ROSS,
JOHN E. SANDERS,
JAMES S. CASEY,
Attorneys for Defendant.

Service of the foregoing praecipe is hereby acknowledged this 1st day of September, 1920.

L. KEARNEY and
JAMES R. DUNSEATH,
Attorneys for Plaintiff. [176]

In the District Court of the United States, for the
District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION,

Defendant.

Stipulation Re Praecipe for Transcript of Record.

It is hereby stipulated and agreed by and between the attorneys for plaintiff and the attorneys for defendant in the above-entitled action that the portion of the record herein, as set forth in the foregoing praecipe, shall constitute the transcript of

record on writ of error in the above-entitled action.

L. KEARNEY and

JAMES R. DUNSEATH,

Attorneys for Plaintiff.

ELLINWOOD & ROSS,

JOHN E. SANDERS,

JAMES S. CASEY,

Attorneys for Defendant.

[Endorsement]: Epifanio Guerrero, Plaintiff, vs. Phelps Dodge Corporation, a Corporation, Defendant. Praecipe. Filed Sep. 1, 1920. C. R. McFall, Clerk United States District Court for the District of Arizona. [177]

In the United States District Court for the District of Arizona.

L.—219.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corporation,

Defendant.

Order Enlarging Time to and Including November 2, 1920, to File Record and Docket Case With Clerk of the Circuit Court of Appeals.

On consideration of the application of C. R. McFall, Clerk of the United States District Court for the District of Arizona, and good cause appearing therefor,—

It is ORDERED that the time within which the original certified transcript of the record in the above-entitled cause may be filed and within which the cause may be docketed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, be, and the same is extended and enlarged to and including the 2d day of November, 1920.

Dated at Tucson, Arizona, this 28th day of September, 1920.

WM. H. SAWTELLE,
Judge of the United States District Court for the
District of Arizona.

[Endorsement]: Filed September 28, 1920. C. R. McFall, Clerk. By J. Lee Baker, Chief Deputy Clerk. [178]

In the District Court of the United States for the
District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corpora-
tion,

Defendant.

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of

the United States for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said United States District Court for the District of Arizona, including the records, papers and files in the case of Epifanio Guerrero, Plaintiff, versus Phelps Dodge Corporation, a Corporation, Defendant, said case being number Law 219—Tucson on the docket of said court.

I further certify that the foregoing 179 pages, numbered from 1 to 179, inclusive, constitute a full, true and correct copy of the record, and of the assignment of errors and all proceedings in the above-entitled cause, as set forth in the praecipe filed in said cause and made a part of this transcript as the same appears from the originals of record and on file in my office as such clerk.

And I further certify that there is also annexed to said transcript the original writ of error, the original assignment of errors and the original citation issued in said cause.

I further certify that the cost of preparing and certifying to said record, amounting to Fifty-four & 80/100 Dollars (\$54.80/100), has been paid to me by the above-named defendant (plaintiff in error).

WITNESS my hand and the seal of said Court this 22d day of October, 1920.

[Seal]

C. R. McFALL,
Clerk of the District Court of the United States
for the District of Arizona. [179]

In the District Court of the United States for the
District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corpora-
tion,

Defendant.

Assignment of Errors (Original).

Comes now the above-named defendant and makes and files this, its assignment of errors, upon which it will rely on the prosecution of its writ of error to review the judgment herein rendered on the 14th day of May, 1920.

I.

The Court erred in sustaining plaintiff's objection to defendant's cross-examination of plaintiff, and excluding the answers elicited by such examination, by which defendant proposed to show that the plaintiff's left eye was not in the condition plaintiff testified that it was, and that plaintiff did not state such to be its condition when his left eye was examined by the defendant's witness, Dr. H. W. Rice; that any communication made [180] by the plaintiff to the defendant's witness, Doctor H. W. Rice, or any examination made by such physician, was not with reference to any physical or supposed physical disease of plaintiff. For this purpose, the

defendant propounded the following question and the following discussion ensued:

Q. Did you tell Doctor Rice that you could not see in that eye when you went to him?

Mr. KEARNEY.—I object to that question as privileged.

The COURT.—Objection sustained on the ground it is a privileged communication, and it cannot be called for if the plaintiff objects to it.

Mr. MATHEWS.—This is not the time I expected to reach the question, your Honor, but perhaps it may as well be presented now as any other time. The plaintiff in this case, on the examination of his own counsel, has already voluntarily described not only his acts in going to Doctor Rice, but the treatment Doctor Rice administered to him. It has been given in this testimony, on account of some water he says Doctor Rice put in his eye, being too strong. He says the doctor at Morenci, and afterwards identifies him as Doctor Rice. The record will show that he has testified voluntarily in answer to questions by his own counsel, not only that Doctor Rice treated him, but what the treatment consisted of; that he put water in his eyes that was too strong. While I recognize the rule that your Honor refers to, we submit that the door has been opened by counsel.

The COURT.—Well, frankly, I have the same views on the subject. In view of the fact that the evidence was called for by plaintiff's

counsel, and I [181] must confess that I don't know at this time whether calling for that evidence opens the door to your cross-examination as to verbal statements made or not. It would seem that if the plaintiff calls for a part of what took place, that the defendant might be entitled to know all that took place. If the plaintiff had not told anything about the treatment that he received, or the fact that he was treated at all, but may have testified as to the injury, and then called physicians and had them testify as to the result of the injury, that would be a different proposition, but they elected to go further than that, and to testify to the treatment, as to the character of the treatment that he received. It is an unusual situation, and it is an entirely new question, but I prefer, under the circumstances, to permit you gentlemen to look into the question and see whether or not you can find any authorities on the subject, and I will permit you to recall this witness for the purpose of again propounding that question to him, in the event it is held by the Court to be admissible, notwithstanding the fact that in the meantime they may have finished their testimony and closed their case.

Mr. MATHEWS.—For the present, the objection is sustained?

The COURT.—Yes.

Mr. MATHEWS.—May the record show our exception, your Honor?

The COURT.—Yes.

II.

The Court erred in sustaining plaintiff's objection to the testimony of the defendant's witness, Doctor H. W. Rice, and excluding such testimony [182] offered by defendant by which defendant proposed to show that the plaintiff's left eye was not injured as the plaintiff testified, was not in the condition described by plaintiff in his testimony; that plaintiff, in fact, had sustained no injury to his left eye as a result of the accident described by him in his testimony; that the sight of such eye was in no way affected or impaired by such accident; that any communication made by the plaintiff to the defendant's witness, Doctor H. W. Rice, or any examination made by such physician was not with reference to any physical or supposed physical disease of the plaintiff, and that the relation of physician and patient did not in fact exist between the defendant's witness, Doctor H. W. Rice, and the plaintiff. For the purpose of eliciting this testimony, defendant propounded the following question and the following discussion ensued:

Q. When he first came to you on that afternoon in the latter part of January, 1919, complaining of the eye injury, when you first examined him, what did you find?

Mr. KEARNEY.—We object, it is a privileged communication.

Mr. DUNSEATH.—Privileged communication.

Mr. MATHEWS.—We have the same question that was presented a moment ago. I presume we will be permitted to present any authorities we may have in regard to the matter?
[183]

The COURT.—Yes, the plaintiff has permitted you without objection to go this far.

Mr. DUNSEATH.—I believe the only question was about seeing him and making an examination.

The COURT.—No, he has gone into the fact that he has treated him.

Mr. KEARNEY.—He does not testify to any treatment.

Mr. MATHEWS.—I would suggest that we do not think this question is objectionable. It refers, not to an oral communication made by the plaintiff, but to something which the doctor himself found in the course of his examination and treatment, about which examination and treatment the plaintiff himself has testified voluntarily, going to the extent of telling in part what that treatment consisted of, and actually complaining before the jury of what the doctor did, criticising and finding fault with him, and we contend clearly that under that state of the record that plaintiff himself has swept away his privilege and opened the door to us to have the doctor give the whole

thing rather than be confined to the one-sided statement of the plaintiff.

The COURT.—There is no doubt about this being a privileged communication, and the only question is whether you have or have not yourselves opened the door for the introduction of that testimony by going as far as you have in the examination of the plaintiff, and also in allowing, without objection, the examination of this witness up to the time when they called for the actual oral conversation between them.

Mr. DUNSEATH.—The examination of this doctor has not proceeded to any extent whatsoever that it becomes a waiver of the privilege. We could [184] not consistently.

Discussion.

The COURT.—I will sustain the objection for the present.

Mr. MATHEWS.—We will ask the record to show our exception.

The COURT.—You may have an exception.

III.

The Court erred in sustaining the plaintiff's objection to the testimony of the defendant's witness, Doctor J. B. Gray, and excluding such testimony offered by defendant, by which defendant proposed to show that the plaintiff's left eye was not injured as the plaintiff testified, was not in the condition described by plaintiff in his testimony; that plaintiff, in fact, had sustained no injury to his left eye as a result of the accident described by him in his testimony; that the sight of such eye was in no way

affected or impaired by such accident; that any communication made by the plaintiff to the defendant's witness, Doctor J. B. Gray, or any examination made by such physician was not with reference to any physical or supposed physical disease of the plaintiff, and that the relation of physician and patient did not in fact exist between the defendant's witness, Doctor J. B. Gray, and the plaintiff. For the purpose of eliciting this testimony, [185] the defendant propounded the following question and the following discussion ensued:

Q. What sort of an examination did you put the plaintiff through?

Mr. DUNSEATH.—We object to the question on the ground it is privileged.

The COURT.—Objection sustained.

Mr. MATHEWS.—I would like to be heard on that.

The COURT.—All right, I will withdraw the rule and allow you to be heard.

Mr. MATHEWS.—The point here is a new question, so far as I know, and it has not been raised previously in any other case in this court. We have here a situation where the relation of patient and physician within the meaning of the statute, does and did not exist. The situation is exactly similar to that which would exist where a prospective employee comes to a prospective employer and under the rule submits himself to a physical examination to enable the prospective employer to know whether he is physically fit to work; that that

is the sole purpose of the examination. Not being that of medical treatment, but to secure information for the employer for his use in determining this very fact. That is frequently the case, and I recall one instance at least where such testimony was permitted in this court, the testimony of a physical examination, upon application for employment. The theory of it is that there is no relation of physician and patient in the ordinary sense. But the situation is one where a person who is examined voluntarily submits himself to a physician in order to enable the third person to know something of the condition which he otherwise would not be able to ascertain for himself. We have here precisely the same sort of [186] situation. The purpose may be a different purpose, but the situation, so far as I can see any legal distinction, is similar. We have here a man who has been an employee and has received or claimed to have received an injury, and he is negotiating with his employer seeking some sort of a settlement, and the employer desires to know what the true condition of that man is for his own information and guidance in making a settlement or refusing such a settlement, and that purpose if fully explained to the employee, the person supposed to be injured, and the arrangement has been made by mutual consent between the employee and the employer whereby a physician may be used, and that with the understanding that the in-

formation obtained by the physician shall be communicated to the employer; made known to him for the very purpose of possible settlement, or possible negotiations. Now, if there is any element of confidence to that, it does not occur to me. It is not the relation of patient and physician any more than he was able to go to some other place and have this examination made. Suppose he went to some physical director or some atheletic trainer and said, "I want you to measure me for such and such a thing; I want you to determine certain things about my body, and my size, etc., because another man wants it, and I want him to have it, and I am willing that he should have it." There would be absolutely no relation of physician and patient as ordinarily understood. It just happens in this case that the person who is able to get this information, and who both parties desire to go and get the information is a physician. His ability depends upon the fact that he has expert medical knowledge, and the testimony of Mr. Hodgson, coupled with the testimony already given by Dr. Gray shows absolutely no relation of physician and patient existed in this case. The privilege [187] never existed, and it could not have been intended to have existed. I think that the privilege is waived, if one ever existed, when I say, "All right, I will go to a doctor and let him examine my eye or anything else about me; I will let him examine me with reference to an injury

or supposed injury for the purpose of enabling you to know those things about me which you are now not thoroughly satisfied about." Now, if there is going to be a question of privilege raised, certainly I waive that privilege when I give that consent. I think the true theory of it was that the relation of patient and physician never existed. There was no understanding that there was to be any treatment in this case. As to the other physician, Doctor Martin, Mr. Hodgson testified he sent him there for examination and possible treatment. Not so here in this case. It was solely a matter of obtaining information about this man. He might have said, "No, I will not submit to it. I will let you find out the best way you can," but he says, "All right, I will go." He did not take advantage of that. He says, "If you will pay the expenses, arrange for some doctor specialist in this line, give me the money to go down there, I will go and submit myself so that you may have the information which you have not now, and then perhaps we will be able to arrive at some settlement or something. You will have the facts more to your satisfaction." I can't see that the confidential relation or possible privilege could grow out of that.

The COURT.—I think the Court should know whether there was such a relation at the time, and I suppose that it would only be fair to the defendant for the plaintiff to testify as

to his understanding, whether he did so agree before ruling on that. [188]

Mr. KEARNEY.—Shall we put the plaintiff on the stand and examine him a little bit?

The COURT.—I think so.

EPIFANIO GUERRERO, being recalled by counsel for the plaintiff, by permission of the Court, and having been heretofore duly sworn, through the interpreter, testified as follows:

Direct Examination by Mr. KEARNEY.

Q. When you went to El Paso, what did you understand you were going there for? Did you understand that you were going there to have your eye treated?

Mr. MATHEWS.—Your Honor, we object to that.

The COURT.—The first part of the question is perfectly proper, I think, but the latter part of it is objectionable. His understanding of what he was going there for is proper.

Q. What did you understand you were being sent to El Paso for?

A. To benefit my eye; it would do my eye some good.

Q. Did you believe when you went there that you were to receive treatment for your eye, or try to better your eye or not?

A. Yes, sir, with that intention.

Q. You went there for the purpose of receiving some benefit to your eye?

A. Yes, sir, most assuredly. How would I be in this fix?

Q. Did you pay hospital fees when you worked for the company? A. Yes, sir.

Q. And that goes to help keep up the hospital by the doctors there?

The COURT.—I want to know if there was any understanding between this witness and any officer of the company [189] at the time he left.

Mr. KEARNEY.—He says now, to get a better eye.

The COURT.—You may cross-examine him, if you so desire.

Cross-examination by Mr. MATHEWS.

Q. You only stayed in El Paso one day, I believe you testified?

A. The day that I left, the doctor sent me to El Paso, and I got there at two-forty and I went to the doctor right away, and I left there the next day.

Q. They did nothing to you but examine you, did they?

A. That is all.

Q. You came back as soon as he examined you, did you?

A. Yes, sir, sure, I was going down on some business.

Mr. MATHEWS.—No further cross-examination.

Redirect Examination by Mr. KEARNEY.

Q. Did you believe that the doctor that you saw at El Paso was acting with the doctors at Morenci?

Mr. MATHEWS.—That is objected to on the ground it is irrelevant. What this man believed since, founded upon some unreasonable ground, is not competent. He may believe anything. The true situation here is whether or not this arrangement that Mr. Hodgson has sworn to occurred here. That has not been contradicted so far by anybody.

The COURT.—I will ask him myself.

Q. What, if any, conversation did you have with Mr. Hodgson, the gentleman who just testified here, with reference to your going to El Paso? A. Nothing. [190]

Q. Did, or did he not request—did you not request of him or the company a settlement for the injury to your eye?

A. Yes, sir.

Q. Did he or did he not tell you that if you would go to El Paso to be examined by a specialist, an eye specialist, and that specialist made a report to the effect that you had such an injury, that he would settle with you?

A. No, sir, he did not tell me anything.

Q. Did you have any conversation with him to the effect that you would go down there and be examined, have your eye examined by the El Paso specialist and that if that surgeon should be permitted to make report to him as to the condition in which he found your eye?

A. No, sir, I have never been to El Paso after that.

Q. After what?

The INTERPRETER.—I will ask that question again.

The COURT.—All right.

The WITNESS.—No, sir.

Q. Was it your purpose, and the purpose of the company's officer to obtain a report from the specialist in El Paso in order to enable him to determine whether or not he would settle with you for the injury to your eye?

A. Of the company, do you mean?

Q. Yes.

A. He only examined my eye, but he never told me anything.

Q. Was it agreed between you and Mr. Hodgson before you left Morenci that you should go down to El Paso and have your eyes examined and that that specialist should make a report to him, and if the report showed an injury, that he would settle with you for the injury? [191]

A. No, sir, he didn't tell me nothing.

Witness excused.

The COURT.—Well, the evidence in that matter being evenly balanced, I feel that I ought to sustain the objection.

Mr. MATHEWS.—This is a little unusual, your Honor. I take it that this testimony that the plaintiff has given at this point is positively rebuttal. It is not a part of his main case.

The COURT.—No, it is preliminary, to enable the Court to determine whether or not this testimony should be admitted, or whether it should be excluded because it is privileged.

Mr. MATHEWS.—I understand perfectly what it is for, but that is the way in which these things should come. The plaintiff puts in his case, and at least, the defendant has made a *prima facie* case, or showing here, and a very strong one, that a certain state of facts existed which would take this case entirely out of the privileged communications. Now, in rebuttal—it does not matter when it happened—the plaintiff is permitted out of order, to meet that *prima facie* showing and endeavor to overcome it.

The COURT.—Only for the purpose of enabling the Court to determine whether the doctors' evidence is privileged.

Mr. MATHEWS.—The plaintiff testified that he never knew that such a man as Hodgson existed, and naturally he would say he never had any such a conversation with him, but when we make this showing, we are entitled to put the testimony in on the face of this *prima facie* showing, and then if the plaintiff wants to attack this *prima facie* showing, he does it on rebuttal, and then after the showing is presented, the [192] whole thing, under proper instructions, goes to the jury. But to say that while the *prima facie* showing that we have made here, and then right in the middle of the trial allow the plaintiff to come in and attack that, without letting us go through with our testimony, and then say because the testimony is conflicting, and in the opinion of the Court

evenly balanced, that the rule should be made against the defendant, and the defendant will not be permitted to put the testimony in at all, seems to me rather hard.

The COURT.—Maybe yō are right.

Mr. MATHEWS.—It strikes me. I don't want to bring in something here for the purpose of making an error, but it strikes me—it seems to me clear that it is like many, many other situations where *prima facie* showing are to be made first. That does not mean that it is final. It may be overcome later by the rebuttal, but if we make a *prima facie* showing, and put this in proper form, and then like anything else, or other situations, it is simply a matter for the jury, under the proper instructions from the Court what to do with this, in case they believe such and such a thing, and disregard it if they do not believe such and such a thing, and not a matter to be finally determined by the Court in its finding.

The COURT.—You object to it?

Mr. KEARNEY.—I object to it on the ground it is privileged.

The COURT.—I sustain the objection.

Mr. MATHEWS.—We ask that our exception be entered.

The COURT.—You may have an exception.

[193]

The Court erred in said ruling in holding:

(a) That the matter sought to be elicited was privileged.

(b) That the relation of physician and patient existed between the defendant's witness, Dr. J. B. Gray, and the plaintiff.

(c) That the burden of proving that such relation did not exist was on the defendant.

(d) In changing the order of proof and holding that the examination of plaintiff as to the relation between the plaintiff and the defendant's witness, Dr. J. B. Gray, was a part of plaintiff's case in chief and not rebuttal.

(e) In passing on a question of fact and taking it from the jury.

(f) In weighing the evidence and determining the credibility of witnesses.

(g) In holding the evidence to be evenly balanced on the question presented.

(h) In excluding the testimony offered after holding that the evidence was evenly balanced.

(i) In excluding the evidence offered after defendant had made a *prima facie* showing that the relation of physician and patient did not in fact exist between the defendant's witness, Dr. J. B. Gray, and the plaintiff.

(j) In holding the question presented to be one of admissibility or competency and not [194] of weight or credibility.

(k) In, in effect, depriving defendant of its entire defense by changing the order of proof and placing the burden of proof on defendant.

IV.

The Court erred in sustaining the plaintiff's objection to the testimony of the defendant's witness,

Doctor J. B. Gray, and excluding such testimony offered by defendant, by which defendant proposed to show that the plaintiff's left eye was not injured as the plaintiff testified, was not in the condition described by plaintiff in his testimony; that plaintiff, in fact, had sustained no injury to his left eye as a result of the accident described by him in his testimony; that the sight of such eye was in no way affected or impaired by such accident; that any communication by the plaintiff to the defendant's witness, Doctor J. B. Gray, or any examination made by such physician was not with reference to any physical or supposed physical disease of the plaintiff, and that the relation of physician and patient did not in fact exist between the defendant's witness, Doctor J. B. Gray, and the plaintiff. For the purpose of eliciting this testimony, the defendant propounded the following question and the following discussion ensued: [195]

Q. What part of the examination did you conduct, and what part did Doctor Detweiler conduct?

Mr. KEARNEY.—We object to that; it is privileged to him.

The COURT.—Sustained.

Mr. MATHEWS.—The defendant desires an exception.

The COURT.—Exception.

Q. Now, what—I will ask you this, and you need not be in a hurry to answer it, because the counsel on the other side will object. I don't want to waste time, your Honor.

The COURT.—You may ask the question.

Q. You need not be in a hurry with your reply, Doctor. Did you and Doctor Detweiler, or either of you on this occasion make a test of the plaintiff to ascertain whether or not he really was blind in his left eye?

Mr. KEARNEY.—I object to that on the ground it is privileged.

The COURT.—I sustain the objection.

Mr. MATHEWS.—The defendant excepts.

Q. Now, one more question along that line, slightly different, your Honor. Did you and Doctor Detweiler or either of you on that occasion apply the scientific tests for the purpose of ascertaining whether or not the plaintiff's left eye was normal or abnormal?

Mr. KEARNEY.—We object to that question on the same ground.

The COURT.—Same ruling.

Mr. MATHEWS.—Same exception, Mr. Reporter.

Q. And on the same occasion did you also make an examination of the plaintiff's right eye? [196]

Mr. KEARNEY.—I object to that on the same ground.

The COURT.—Same ruling.

Mr. MATHEWS.—Same exception. We have no further examination. Just one more question.

Q. As a result of that whole examination made by yourself and Doctor Detweiler, did

you reach a conclusion as to the condition of the plaintiff's eyes?

Mr. KEARNEY.—I object to that on the same ground.

The COURT.—Sustained.

Mr. MATHEWS.—Exception.

V.

The Court erred in holding that the matters sought to be elicited by defendant's question, "What sort of an examination did you put the plaintiff through?" propounded to the defendant's witness, Doctor J. B. Gray, as set forth in full in assignment of error numbered 3 herein, was privileged to the plaintiff.

VI.

The Court erred in placing the burden of proving that the relation of physician and patient did not exist between the defendant's witness, Doctor J. B. Gray, and the plaintiff, upon the defendant. [197]

VII.

The Court erred in excluding the testimony offered by defendant through its witness, Doctor J. B. Gray, as set forth in full in assignment of error numbered three herein, after holding the evidence as to the relation of physician and patient between defendant's said witness and the plaintiff to be evenly balanced.

VIII.

The Court erred in sustaining plaintiff's objection to the testimony of the defendant's witness, Doctor H. H. Starke, and excluding such testimony offered by defendant by which defendant proposed to show

that any communication made by the plaintiff to the defendant's witness, Doctor H. H. Starke, or any examination of plaintiff by such physician was not with reference to any physical or supposed physical disease of the plaintiff. For the purpose of eliciting this testimony defendant propounded the following question:

Q. Now, I will put a question which will probably be objected to and the doctor need not answer promptly until the objection is made. What did you find as a result of that examination?

Mr. KEARNEY.—Now, we object to that as privileged.

The COURT.—Objection sustained on the ground it is a privileged communication. [198]

Mr. MATHEWS.—Defendant excepts.

IX.

The Court erred in refusing and failing to give the following instruction to the jury, as requested by the defendant:

Gentlemen of the jury, the law of this State permits the plaintiff in a case of this kind to object to the testimony of any physician who may have examined or treated him, as to what he told such physician about his ailments or as to what the physician himself discovered by his examination of the plaintiff. The law does not require the plaintiff to make any such objection, but leaves him free to make it or not make it, as he sees fit. If he does make the objection, the Court is required to sustain it. In this

case, the testimony of certain physicians has been offered by the defendant corporation, and has been objected to by the plaintiff, and this testimony has been excluded, not because the Court was unwilling to admit it, but simply because the plaintiff objected to it, and the Court, under the law, was required to sustain the objection. The fact that the plaintiff has made this objection, and has thereby kept these physicians from testifying, is a fact to be considered by you in weighing the plaintiff's own testimony, and in judging of the truth of the story he tells.

WHEREFORE, defendant prays that said judgment be reversed.

ELLINWOOD & ROSS,

JOHN E. SANDERS,

JAMES S. CASEY,

Attorneys for Defendant. [199]

[Endorsed]: In the District Court of the United States for the District of Arizona. Epifanio Guerrero, Plaintiff vs. Phelps Dodge Corporation, a Corporation, Defendant. Assignment of Errors. Filed Sep. 1, 1920. C. R. McFall, Clerk United States District Court for the District of Arizona. [200]

Writ of Error (Original).

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable the Judge of the District Court of the United States for the District of Arizona, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court of the United States for the District of Arizona, before you, between Epifanio Guerrero, plaintiff, and Phelps Dodge Corporation, a corporation, defendant, a manifest error hath happened, to the great damage of the said Phelps Dodge Corporation, as by its complaint appears, we, being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Ninth Circuit, [201] at San Francisco, California, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right,

and according to the laws and customs of the United States, should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 2d day of September, in the year of our Lord one thousand nine hundred and twenty.

[Seal]

C. R. McFALL,

Clerk of the District Court of the United States for the District of Arizona.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that a copy of the foregoing writ of error was this day lodged in my office by Phelps Dodge Corporation, a corporation, plaintiff in error, for Epifanio Guerrero, defendant in error.

WITNESS my hand and the seal of said court, this 2d day of September, 1920.

[Seal]

C. R. McFALL,

Clerk of the District Court of the United States for the District of Arizona. [202]

[Endorsed]: In the District Court of the United States for the District of Arizona. Epifanio Guerrero, Plaintiff vs. Phelps Dodge Corporation, a Corporation, Defendant, Writ of Error. Filed Sep. 2, 1920. C. R. McFall, Clerk United States District Court for the District of Arizona. [203]

In the District Court of the United States for the
District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corpora-
tion,

Defendant.

Citation on Writ of Error. (Original).

United States of America,—ss.

To Epifanio Guerrero, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Arizona, wherein Phelps Dodge Corporation, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf. [204]

WITNESS the Honorable WILLIAM H. SAWTELLE, United States District Judge for the District of Arizona, this 2d day of September, 1920.

WM. H. SAWTELLE,
United States District Judge.

Service of the foregoing citation is hereby acknowledged this 8th day of September, 1920.

L. KEARNEY and
JAMES R. DUNSEATH,
Attorneys for Plaintiff.

[Endorsed]: In the District Court of the United States for the District of Arizona. Epifanio Guerrero, Plaintiff vs. Phelps Dodge Corporation, a Corporation, Defendant. Citation on Writ of Error. Filed Sep. 2. 1920. C. R. McFall, Clerk United States District Court for the District of Arizona.

[Endorsed]: No. 3591. United States Circuit Court of Appeals for the Ninth Circuit. Phelps Dodge Corporation, a Corporation, Plaintiff in Error, vs. Epifanio Guerrero, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Filed October 25, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States ²
Circuit Court of Appeals
For the Ninth Circuit.

PHELPS DODGE CORPORATION, a Corpora-
tion,

Plaintiff in Error,

vs.

EPIFANIO GUERRERO,

Defendant in Error.

In Error to the District Court of the
United States
For the District of Arizona

Brief of Plaintiff in Error

EVERETT E. ELLINWOOD,
JOHN MASON ROSS,
JAMES S. CASEY,
JOHN E. SANDERS,

Attorneys for Plaintiff in Error.

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No. 3591

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

PHELPS DODGE CORPORATION, a Corporation,
tion,

Plaintiff in Error,

vs.

EPIFANIO GUERRERO,

Defendant in Error.

Brief of Plaintiff in Error

STATEMENT OF THE CASE

This is a writ of error bringing here for review a judgment entered in the District Court of the United States for the District of Arizona against the plaintiff in error. For convenience, we will refer to the parties by the designation used in the court below.

The plaintiff, a citizen of the Republic of Mexico, brought his action against the defendant, a New York corporation, under the Employers' Liability Law of Arizona, claiming damages for an injury suffered in the course of his employment in one of the hazardous occupations enumerated in the Law.

Defendant consented to the jurisdiction. The action was tried before Honorable William H. Sawtelle, District Judge, with a jury, at the May, 1920, term of Court, at Tucson, Arizona. The trial resulted in a verdict for plaintiff in the sum of Twenty-seven Hundred and Fifty Dollars.

Defendant's position is frankly that plaintiff is an impostor, a malingerer. (Transcript of Record, Page 52). If he is not, the judgment in this case is inadequate and the jury should have given him greater damages. If we are right, the verdict should have been for defendant. We do not mean to say that plaintiff now has normal vision; we do not know what his vision is. (Transcript of Record, Page 106). We know what it was when defendant's specialists examined his eye. Our contention is that when he was examined by defendant's four specialists immediately after the date he ascribes to his accident, his vision was not, and he did not claim it to be, what he stated it then was at the trial, i. e. total blindness of the left eye.

The Court held the testimony of these physicians privileged and defendant was prevented from putting this state of facts before the jury. Substantially, the record presents but one question. Was this action of the Court error?

To get the case at the outset fully and fairly before the Court and to clearly indicate how this question was presented below demands a statement of facts longer and more in detail than is customary. If it impinges on the rule as to brevity, it is a necessary and, we think, permissible infraction.

The amended complaint alleges that on the 20th day of January, 1919, while the plaintiff was employed as a mucker and miner in a mine of the defendant's at Morenci, Arizona,

“As plaintiff was striking a boulder to break the same with a sledge-hammer, in the line of his duties as such employee, some particles of rock flew off from such boulder as plaintiff struck same with a sledge-hammer and the same flew into and violently struck in his eyes, and as the said particles of rock struck the plaintiff into his eyes, it produced in him weak, giddy and confused condition, and which said rock striking him in his eyes has ever since caused him much injury to both his eyes, and has practically caused him the loss of his left eye, and he has now as a result of said injury very faint vision in his left eye.” (Transcript of Record, Pages 9-10).

Hereafter we will refer to the page of the transcript of record as follows: (Tr. p.——). Although the complaint alleges that plaintiff was struck in the eyes, his testimony was that he was struck in the left eye and as to an injury to that eye (Tr. p. 42).

The only evidence as to the facts of the accident was given by plaintiff. In response to questions propounded by his counsel he stated:

“We were digging out ore and one of them big rocks fell down and I hit it with an eight-pound sledge-hammer and when I hit it, one of them pieces broke off and hit me in the eye.” (Tr. p. 42).

Plaintiff attempted to account for the fact that there was no one else to testify as to the accident.

“My partner was on one side, one square of the lumber, and I was on the other square of the lumber myself.” (Tr. p. 43). “I don’t know where this person is that was working with me. When they stopped the work where I was working, he stopped him from work and he went away. He was also deaf besides; the man that was working with me was deaf.” (Tr. p. 43).

On cross-examination, plaintiff stated:

“He was working right at that square, and I was on the other one, and he saw the rock when it hit me in the eye, and I says to him: ‘I hurt my eye with that rock’ and he looked at me and just shook his head.” (Tr. p. 47).

Plaintiff continued:

“From the time I got my eye hurt until I went out to lunch, I kept on working, and at that time when we went out I reported to the foreman, they call him Gene, but I think his name is Santiago. He is still foreman at Morenci. He is around the Arizona there somewhere. I don’t know whether he is still at Morenci or not.” (Tr. p. 48). “I went to see the doctor right away.” (Tr. p. 48). “That was Dr. Rice, I think they call him.” (Tr. p. 48).

On his direct examination, plaintiff stated that he was blind in his left eye. (Tr. p. 45). On cross examination, he emphatically reiterated this statement (Tr. p. 45), though it appeared that he wanted to give the

impression that Dr. Rice's treatment of his eye had in some way contributed to the injury; he says:

"I used to go to the doctor about every other day. I went to him for eight days and then he put some kind of a water that was too strong in my eye, or something and from there they sent me to Phoenix." (Tr. p. 48-49).

Further:

"He treated me for some days with some black medicine that he put in my eye and one of those days he went over there and he dipped a little piece of stick and a little cotton on the end of that stick, and he put it in a bottle, and when he come out with it, it smoked like, and when he put it in my eye, it burned like everything. It was pretty strong for my eye." (Tr. p. 48-49).

At the close of plaintiff's cross-examination he was asked if he were willing to submit himself to examination by a physician to be appointed by the Court. He replied:

"I have been examined; what more examination do you want?" (Tr. p. 52).

On being asked a second time, he replied:

"I have been suffering; no, sir; I have been suffering so long, what is the use of having that examination."

He was pressed for a categorical answer and finally answered in the negative. (Tr. p. 52).

The following question was then put to plaintiff's counsel:

MR. MATHEWS: (Defendant's counsel)
 "Your Honor, we now inquire of counsel for the plaintiff if they, as his attorneys, are willing to submit him to examination by impartial physicians to be appointed by this Court and test his eyesight, and report to the Court whether or not it is true he can't see." (Tr. p. 52).

This inquiry, elicited the following response from Mr. Dunseath, one of the plaintiff's counsel:

"If this man is not suffering from an injury, we want to know it." (Tr. p. 52).

The Court stated that an impartial physician would be selected but the trial would not be delayed for that purpose. Doctor B. F. Hardridge, an oculist, was selected by the Court, and at the close of the evidence made a statement as to the examination which he had made of plaintiff's eyes during a recess of the court. (Tr. p. 101).

The examination of the plaintiff was resumed. On re-cross-examination he stated:

"My left eye first became blind the same time as that injury. I have been blind in that eye ever since that rock struck me. Yes, I was injured in that eye when I first went to see Doctor Rice." (Tr. p. 53-54).

The question was then put to the plaintiff:

"Did you tell Doctor Rice that you could not see in that eye when you went to him?" (Tr. p. 54).

This was objected to as privileged. The objection was sustained and an exception saved (Tr. p. 55).

Defendant predicated its first assignment of error on this ruling (Tr. p. 131).

In its appropriate place, it will be urged that there was no question present here but the scope of the direct examination being such as to permit the question on cross examination; that the Arizona statute creating the privilege between physician and patient had no application because the Statute is obviously a bar only to disclosures by the physician, and is not intended to circumscribe the patient's utterances.

The second error assigned occurred during the direct examination of defendant's first witness, Doctor H. W. Rice, at the date in question, a physician on the defendant's medical staff at Morenci. (Tr. p. 57). Of the many doctors who examined the plaintiff's eye, Doctor Rice was the first. (Tr. p. 67). He had the plaintiff under his observation over a month immediately following the date of injury. (Tr. p. 68).

After the usual preliminary questions, Doctor Rice was asked:

“When he first came to you on that afternoon in the latter part of January, 1919, complaining of the eye injury, when you first examined him, what did you find?” (Tr. p. 69).

The objection that the matter was privileged was interposed (Tr. p. 69) and sustained (Tr. p. 69). The defendant saved an exception (Tr. p. 71).

At another point we will present the argument that the matter excluded was not privileged because subdivision 6, Paragraph 1677, Civil Code, R. S. of Ariz., 1913, establishing the privilege between physi-

cian and patient has no application to cases of traumatic injury, being in terms restricted to "physical or supposed physical disease."

While plaintiff was in the defendant's hospital during February, 1919, he was under the care of the head nurse, Miss Maude L. Messing (Tr. p. 71), defendant's second witness. Miss Messing found that the eye responded to treatment (Tr. p. 73). That it seemed to be no different than any other ordinary inflammation of the eye (Tr. p. 73), but that on two or three occasions, following a period of improvement, after the patient had been left alone at night, an unaccountable change for the worse developed (Tr. p. 73). That no matter when you went into the room, he always looked up at you and said he could not see (Tr. p. 74), several times a day and every day (Tr. p. 74).

During the months of January and February, 1919, plaintiff called a number of times at the general office of the defendant company and talked about his injury with the Company's manager, Joseph P. Hodgson (Tr. p. 75-78), defendant's third witness. He wore blue glasses but did not claim to be blind (Tr. p. 76). In fact, he said that he could see (Tr. p. 76). The plaintiff was told by the defendant's manager that he was willing to send him to any specialist or specialists for a careful examination so as to be absolutely sure that he had really received an injury to his eye (Tr. p. 76). If the examination of the specialists demonstrated such to be the case, he would settle with him (Tr. p. 76). The manager testified plaintiff understood that the examinations of

the specialists were for the purpose of seeking information for the defendant upon which to decide if a settlement should be made (Tr. p. 77). Plaintiff admitted that he requested a settlement (Tr. p. 74), and that he was sent to the specialists by the Company (Tr. p. 50). Also that the specialists examined his eye (Tr. p. 51, p. 85), but did not treat him (Tr. p. 44). The Company paid the doctors and the plaintiff's expenses on his trip to see them (Tr. p. 77).

However, when the plaintiff was recalled to the stand for the purpose of questioning him as to his understanding of the arrangement (Tr. p. 83), after an unavailing effort on the part of his own and defendant's counsel to get some light on the subject (Tr. p. 83), and an examination by the Court (Tr. p. 84) as to his conversations with defendant's manager, he fell back on the flat denial "He didn't tell me nothing." (Tr. p. 85).

Plaintiff admitted that he was examined by a specialist in Phoenix, Arizona, whose name he did not know (Tr. p. 49). That afterwards, he saw a doctor in El Paso who examined his eye (Tr. p. 50). Doctors J. B. Gray, D. W. Detweiler and H. H. Starke, all eye specialists practicing in El Paso, Texas, called to the stand by defendant, identified the plaintiff and testified that they had examined his eye, Doctors Gray and Detweiler in March, 1919, (Tr. p. 78, p. 96), Doctor Starke approximately a year before the trial (Tr. p. 99).

The first of these specialists to take the stand was Doctor J. B. Gray (Tr. p. 78). After the usual preliminary questions, he was asked:

“What sort of an examination did you put the plaintiff through?” (Tr. p. 79).

It was objected that the matter was privileged. The objection was sustained but the Court withdrew the rule and allowed defendant's counsel to be heard (Tr. p. 79).

The defendant argued the uncontroverted evidence was that plaintiff had consented to the examination of his eye by Doctor Gray for the purpose of informing defendant as to the condition of the eye; that the relation of physician and patient, under such circumstances, did not exist between Doctor Gray and the plaintiff, that there could be no confidential relation when the examination was for the express purpose of disclosures to defendant (Tr. p. 79-80).

At this juncture, the Court, of its own motion, called the plaintiff to the stand for the purpose of ascertaining his understanding of the basis upon which the examination by Doctor Gray was made. (Tr. p. 82). The plaintiff was examined by his own and defendant's counsel (Tr. p. 83-84) and by the Court (Tr. p. 84-85). At the conclusion of plaintiff's testimony the Court ruled, saying:

“Well, the evidence in that matter *being evenly balanced*, I feel that I ought to sustain the objection.” (Tr. p. 85) (Italics ours).

This ruling precipitated further discussion. It was urged by defendant that a *prima facie* showing that the relation of physician and patient did not exist having been made, the evidence should be admitted and go to the jury with proper instructions, plaintiff's testimony clearly being rebuttal. The

Court adhered to its ruling that the matter was privileged (Tr. p. 87). Defendant saved an exception (Tr. p. 87).

The contention that this ruling was error will be fully developed at another point. A brief outline is appropriate here.

When one agrees to an examination by a physician solely for the purpose of informing another of his physical condition, no confidential relation arises between the physician and the person thus examined. The information secured is not privileged.

The Court invaded the province of the jury in weighing the evidence of the plaintiff and defendant's witness, J. P. Hodson, as to the purpose of Doctor Gray's examination of the plaintiff, and in passing on their credibility.

The Court reached an erroneous conclusion in holding that the relation of physician and patient existed between Doctor Gray and the plaintiff. If it be held that the question was proper for the Court as passing on the competency of a witness, such conclusion is reviewable here.

The burden of proving that the relation of physician and patient existed was on the plaintiff. The Court erred in excluding the testimony of Doctor Gray after holding the evidence to be evenly balanced on this question.

A like objection, that the matter sought to be elicited was privileged, was interposed to several further questions put by the defendant to Doctor Gray (Tr. p. 88-89). It will be observed that the point heretofore made, namely; Subdivision 6, Paragraph

1677, Civil Code, R. S. A. 1913, does not apply to communications or examinations as to traumatic injury, as well as the point, the relation of physician and patient did not exist between Doctor Gray and the plaintiff, are arguable under all of these exceptions. Each of these five questions asked of Doctor Gray (Tr. p. 88-89) were preliminary, and it was error to hold them within the privilege. In arguing these assignments, it will be seen that the unusual state of the evidence and the obvious value of the answers solicited render the error prejudicial.

Before Doctor Gray's examination was concluded, a number of hypothetical questions were asked by defendant (Tr. p. 90-91), the responses indicating that it would have been impossible for a person to receive a violent blow in the eye from a large rock without the skin showing some marks of the blow or the eye being blackened (Tr. p. 90), and if blindness were caused by such a blow without it immediately resulting (Tr. p. 91). Doctor Gray then delineated at length the technique and tests used to determine whether one claiming an eye injury is faking (Tr. p. 92-93-94).

Doctor D. W. Detweiler, an eye specialist residing at El Paso, Texas, who was called in by Doctor Gray to aid in the examination of the plaintiff's eye in March, 1919 (Tr. p. 97), next took the stand. Upon the suggestion of defendant's counsel, to avoid going through all questions and objections separately, it was stipulated that the record show that the same questions might be considered as having been put to Doctor Detweiler which were put to Doctor Gray,

with the same rulings and exceptions (Tr. p. 97). Doctor Detweiler further stated that he had heard the hypothetical questions put to Doctor Gray as well as Doctor Gray's testimony on the subject of tests applied to determine whether or not one claiming to be blind is in fact blind (Tr. p. 98), and that he agreed with Doctor Gray's conclusions (Tr. p. 98).

Doctor H. H. Starke, another eye specialist, practicing at El Paso, Texas, defendant's last witness, identified the plaintiff (Tr. p. 99), and testified that he had made an examination of the plaintiff's eye approximately a year ago (Tr. p. 99), when the plaintiff came to his office for that purpose.

The witness was asked:

"What did you find as a result of that examination?" (Tr. p. 100).

Plaintiff objected on the ground of privilege. The objection was sustained, and an exception allowed.

What has already been set forth in this statement of the case might be open to misconstruction without some reference to the testimony of the specialist appointed by the Court, Doctor B. F. Hardridge, of Phoenix, Arizona, and that of Doctor Charles P. Dulin, of Tucson, who was plaintiff's witness, and who made an examination of plaintiff's left eye four days before the trial, at his office in Tucson. Doctor Hardridge's examination was made during a recess of the Court and his testimony given at the conclusion of the evidence. Both Doctor Hardridge and Doctor Dulin testified that plaintiff had some vision in his left eye (Tr. p. 61 p. 101, p. 109, p. 111). Doctor Dulin, plaintiff's witness, did not attempt to standardize the vision because he was not requested

to by plaintiff or plaintiff's counsel (Tr. p. 61), though he was thoroughly familiar with the tests customarily used for that purpose (Tr. p. 62) and resorted to to determine whether the subject is telling the truth (Tr. p. 63). After describing in detail the present condition of plaintiff's eye (Tr. p. 57), he was asked by plaintiff's counsel if the condition could have been caused by a blow (Tr. p. 57). He stated that it might (Tr. p. 57).

Doctor Hardridge, the Court's physician, found that plaintiff was able to see with both eyes (Tr. p. 102), but experienced great difficulty when he tried to measure the vision because of plaintiff's absolute refusal to answer questions; because of plaintiff's claim that he was not able to perceive light (Tr. p. 103); because of plaintiff intentionally or unintentionally holding his eyes so that the Doctor could not see them (Tr. p. 110-111). Doctor Hardridge was certain of vision in both eyes, (Tr. p. 105), but could not standardize the left eye because plaintiff refused to cooperate (Tr. p. 105). The only abnormal condition he found in plaintiff's left eye was an internal squint (Tr. p. 107), which in most cases is a congenital condition (Tr. p. 107). He found no condition indicating traumatic injury (Tr. p. 106). It was possible the condition of the eye might have resulted from a blow, but hardly probable (Tr. p. 106).

It is important to keep in mind that Doctor Hardridge examined the plaintiff at the trial (May 14, 1920), and Doctor Dulin a few days before the trial. The record shows that the examinations of Doctors Rice, Gray and Detweiler were made in February

and March, 1919, more than a year before the trial (Tr. p. 68, p. 78, p 97); that Doctor Martin's examination was made at a date earlier than the Gray and Detweiler examinations (Tr. p. 76); that Doctor Starke examined the plaintiff's eyes approximately a year before the trial (Tr. p. 99). Doctor Martin was not present in court although defendant requested his presence. His absence was due to illness (Tr. p. 78).

In commenting upon the difficulty encountered by a specialist in examining a subject who had undergone many previous examinations, Doctor Hardridge testified:

"This man has been examined doubtless a great many times, is more or less familiar with the technique, rendering it very difficult for one to determine accurately. For example, in testing him with the confusion tests of the red and the green, he admitted once only, but I could not get him to repeat seeing red with the red lens in front of the left eye and the green lens in front of the right eye. The reason that I had difficulty in doing this and with other subsequent tests, was his absolute refusal to make answers to my questions. The Jackson Fogging Test, which is the placing of a high focus glass in front of the good eye with a weak lens in front of the left eye, but he refused to answer, claiming he could not see anything, not even light." (Tr. p. 103),

And also:

“As I explained, the first man that sees such a case as that, he is in a position to get good information and a patient acquires a knowledge of technique very readily. This man has been seen perhaps many times, which made it very difficult to determine.” (Tr. p. 108).

SPECIFICATION OF ERRORS

I.

The Court erred in excluding evidence offered by the defendant in ruling that the matter sought to be elicited by defendant's question put to plaintiff on his cross-examination: “Did you tell Doctor Rice that you could not see in that eye when you went to him?” was privileged under sub-div. 6 of par. 1677, Civil Code, Revised Statutes of Arizona, 1913, which provides that physicians may not testify without the consent of the patient. (Tr. p. 131).

II.

The Court erred in excluding evidence offered by the defendant in ruling that the matter sought to be elicited by defendant's question put to defendant's witness, Dr. H. W. Rice: “When he first came to you on that afternoon in the latter part of January, 1919, complaining of the eye injury, when you first examined him, what did you find?” was privileged under sub-div. 6 of par. 1677, Civil Code, Revised Statutes of Arizona, 1913 (Tr. p. 133).

III.

The Court erred in excluding evidence offered by the defendant in ruling that the matter sought to be elicited by defendant's question put to defendant's witness, Dr. J. B. Gray: "What sort of an examination did you put the plaintiff through?" was privileged under sub-div. 6 of par. 1677, Civil Code, Revised Statutes of Arizona, 1913 (Tr. p. 136).

IV.

The Court erred in holding the question as to whether the relation of physician and patient existed between the defendant's witness, Dr. J. B. Gray, and the plaintiff to be a question of admissibility or competency and not of weight or credibility. (Tr. p. 145).

V.

The Court erred in holding the evidence to be evenly balanced on the question as to whether the relation of physician and patient existed between the defendant's witness, Dr. J. B. Gray, and the plaintiff. (Tr. p. 143).

VI.

The Court erred in excluding evidence offered by defendant after defendant had made a prima facie showing that the relation of physician and patient did not exist between the defendant's witness, Dr. B. Gray, and the plaintiff. (Tr. p. 145).

VII

The Court erred in excluding evidence offered by the defendant in ruling that the matter sought to be elicited by defendant's question put to defendant's witness, Dr. J. B. Gray: "What part of the examination did you conduct, and what part did Doctor Detweiller conduct?" was privileged under sub-div. 6 of par. 1677, Civil Code, Revised Statutes of Arizona, 1913. (Tr. p. 147).

VIII.

The Court erred in excluding evidence offered by the defendant in ruling that the matter sought to be elicited by defendant's question put to defendant's witness, Dr. J. B. Gray: "Did you and Doctor Detweiler, or either of you, on this occasion make a test of the plaintiff to ascertain whether or not he really was blind in his left eye" was privileged under sub-div. 6 of par. 1677, Civil Code, Revised Statutes of Arizona, 1913. (Tr. p. 148).

IX.

The Court erred in excluding evidence offered by the defendant in ruling that the matter sought to be elicited by defendant's question put to defendant's witness, Dr. J. B. Gray: "Did you and Dr. Detweiler or either of you on that occasion apply the scientific tests for the purpose of ascertaining whether or not the plaintiff's left eye was normal or abnormal?" was privileged under sub-div. 6 of par. 1677, Civil Code, Revised Statutes of Arizona, 1913. (Tr. p. 148).

X.

The Court erred in excluding evidence offered by the defendant in ruling that the matter sought to be elicited by defendant's question put to defendant's witness, Dr. J. B. Gray: "And on the same occasion did you also make an examination of the plaintiff's right eye?" was privileged under sub-div. 6 of par. 1677, Civil Code, Revised Statutes of Arizona, 1913. (Tr. p. 148).

XI.

The Court erred in excluding evidence offered by the defendant in ruling that the matter sought to be elicited by defendant's question put to defendant's witness, Dr. J. B. Gray: "As a result of that whole examination made by yourself and Doctor Detweiler, did you reach a conclusion as to the condition of the plaintiff's eyes?" was privileged under sub-div. 6 of par. 1677, Civil Code, Revised Statutes of Arizona, 1913. (Tr. p. 148).

ARGUMENT

I.

Specification of Error No. 1 is as follows:

“The Court erred in excluding evidence offered by defendant in ruling that the matter sought to be elicited by defendant’s question put to plaintiff on his cross-examination: ‘Did you tell Doctor Rice that you could not see in that eye when you went to him?’ was privileged under sub-div 6, par. 1677, Civil Code, Revised Statutes of Arizona, 1913, which provides that physicians may not testify without the consent of the patient.”

The paragraph of the Arizona Civil Code referred to reads:

The following persons cannot be witnesses in a civil action:

“**** (6) A physician or surgeon cannot be examined, without the consent of his patient, as to any communication made by his patient with reference to any physical or supposed physical disease or any knowledge obtained by personal examination of such patient; provided, that if a person offer himself as a witness and voluntarily testified with reference to such communications, that is to be deemed a consent to the examination of such physician or attorney.”

The law says the physician may not be examined without the consent of the patient. The intent is to protect the plaintiff from a disclosure by the phy-

sician of confidential matters. This court has so held.

Arizona & N. M. Ry. Co., vs. Clark, 207 Fed. 817.

To say that the statute means that the patient cannot be cross-examined without his own consent reduces it to an absurdity, yet this is what the ruling in question amounts to. We do not argue that a patient could be compelled against his will to testify to confidential communications upon which his physician could not be examined. This might be doing by indirection what the statute directly prohibits.

That is not the situation presented. We simply claim that the plaintiff cannot put in his version of what transpired, half of the conversation so to speak, and then when we ask him a question plainly within the proper limits of cross-examination, have him seek refuge in the statute, virtually saying: All that, for reasons of my own, I don't care to testify to, is privileged.

The Court was in no doubt as to whether the question was proper cross-examination. The following language is from its discussion in ruling:

"It would seem that if the plaintiff calls for a part of what took place, that the defendant might be entitled to know all that took place."

(Tr. p. 55).

On direct examination plaintiff was asked:

"And do you have any vision now in your left eye?"

He answered:

"No." (Tr. p. 45).

He testified further, on direct:

“I could see out of my left eye before the twentieth of January of last year. (Tr. p. 46). I can’t see out of the left eye.” (Tr. p. 51). “I went to the doctor to treat me on the twentieth of January, 1919. The doctor treated me at that time. This was in Morenci. I used to go to the doctor about every other day. I went to him for eight days and then he put some kind of a water that was too strong in my eye, or something, and from there they sent me to Phoenix.” (Tr. p. 43). “That was Dr. Rice, I think they call him.” (Tr. p. 48).

On cross examination he stated:

“My left eye first became blind the same time as that injury. I have been blind in that eye ever since that rock struck me. Yes, I was injured in that eye when I first went to Doctor Rice.” (Tr. p. 53-54).

It was at this point that the question objected to was asked:

“Did you tell Doctor Rice that you could not see in that eye when you went to him?”

It does not seem that argument is required to demonstrate that the question was within the proper bounds of cross examination.

In *Strafford, et ux vs. Northern Pac. Ry. Co.*, 95 Wash. 450, 164 Pac. 71, it was held that a conversation between the physician and plaintiff’s attorney was properly admitted on redirect examination where a part had been called for on cross examination.

Even if the question were not proper cross examination, in the absence of an objection on that specific ground by plaintiff's counsel or the court, we were entitled to an answer.

The ground of objection must be specifically stated.

Quaker Oats Company vs. Grice, 195 Fed. 441;

Fisher vs. Neil, 6 Fed. 89.

On appeal it must be deemed that there was no ground of objection other than that stated, other grounds are waived.

Evanston vs. Gunn, 99, U. S. 660, 25 L. Ed. 306.

That the error was prejudicial is manifest. It would be difficult to frame a question going more to the very foundation of defendant's case. As witnessed by defendant's request for an examination by a physician appointed by the court to determine whether plaintiff was injured in his eye or not (Tr. p. 52), occurring a moment before in the trial, defendant's whole case was that plaintiff's claim of injury, and in fact the injury itself was not such as he stated it to be in his testimony, when he was examined on the twentieth of January, 1919, by Doctor Rice.

The refusal to allow cross examination of a witness upon matters brought out on direct examination, and relevant to the issue, is a denial of an absolute right, and ground for reversal.

Eames vs. Kaiser, 142 U. S. 488, 34 L. Ed.

1901;

Prout vs. Bernards Land & Sand Company,

77 N. J. Law 719, 73 Atl. 486;

Lynch vs. Free, 64 Minn. 277, 66 N. W. 973;

Reeves vs. Dennett, 141 Mass. 207, 6 N. E. 378;

Patrick vs. Crow, 15 Colo. 543, 25 Pac. 985;
United States vs. Knowlton, 3 Dak. 58, 13 N. W. 573;
Graham vs. Larimer, 83 Cal. 173, 23 Pac. 286;
Lamprey vs. Munch, 21 Minn. 379;
Martin vs. Elden, 32 Ohio State, 282.

II.

Specification of Error No. 2 is as follows:

“The Court erred in excluding evidence offered by the defendant in ruling that the matter sought to be elicited by defendant’s question put to the defendant’s witness, Doctor H. W. Rice: ‘When he first came to you on that afternoon in the latter part of January, 1919, complaining of the eye injury, when you first examined him, what did you find?’ was privileged under sud-div. 6, par 1677, Civil Code, Revised Statutes of Arizona, 1913.”

It will be argued here that the defendant’s question was not subject to the objection of privilege because the Arizona Statute applies only to “any physical or supposed physical disease.” There is no claim in this case that the injury is the result of disease. Plaintiff claims that a blow from a rock destroyed the sight of his left eye. Consequently, when the court applied the statute creating the privilege to an injury of a traumatic nature, it included matters not within the purview of the statute.

There is a fundamental difference between disease and accidental injury. Webster defines disease as:

“An alteration in the state of the body, or of some of its organs, interrupting or disturbing the performance of the vital functions, or a particular instance or case of this; any departure from the state of health presenting marked symptoms; also, a special kind of alteration; a particular ailment or malady having special symptoms.”

An accidental injury is one arising from:

“An undesigned contingency; a happening without intentional causation; that which exists or occurs abnormally; something unusual or phenomenal; an uncommon occurrence.”

Patterson vs. Missouri Pac. Ry Co., 77 Kan. 236, 94 Pac. 138.

In distinguishing between injuries arising from disease and injuries arising from accident Mr. Labatt in the second edition of his work on Master and Servant, at page 5417 of volume 5, says:

“On the other hand, it is considered that an injury was caused by an ‘accident’ whenever it was the result of some fortuitous and external event, although the consequences of the injury may be aggravated by plaintiff’s physical condition.”

An inflammation of the eye caused by a splashing of water into the eye resulting in the loss of the eye is an accidental injury.

Sullivan vs. Modern Brotherhood of America, 167 Mich. 524, 133 N. W. 486.

For convenience we set out the Subdivision of paragraph 1677, Arizona Civil Code, on the subject of the privilege between physician and patient.

(6) "A physician or surgeon cannot be examined, without the consent of his patient, as to any communication made by his patient with reference to any physical or supposed physical disease or any knowledge obtained by personal examination of such patient; provided, that if a person offer himself as a witness and voluntarily testify with reference to such communications, that is to be deemed a consent to the examination of such physician or attorney."

The law says a physician cannot be examined as to any communication with reference to any physical or supposed physical disease. If the sentence stopped there, no argument would be necessary. The statute would be expressly limited to communications with reference to disease. But the same clause continues: "or any knowledge obtained by personal examination of such patient." It is all one clause, there is no punctuation between the two. The only question is, does the law expressly open up the subject so as to include within the privilege physical examinations of every sort and with respect to all classes of patients.

This Court, in the Clark case, *supra*, had the same Statute under consideration. While the particular question we raise does not appear to have passed on in the opinion of this Court, 207 Fed. 817, we think that it is settled by the opinion of the Supreme Court of the United States, 235 U. S. 669, 59 L. Ed. 415. It

was there argued that the privilege had been waived by the plaintiff in taking the stand and voluntarily testifying to his physical examination, and that this should have permitted the physician to testify as to the knowledge obtained from such physical examination. The Court said, speaking through Mr. Justice Pitney, on Page 676 of the U. S. Reports, and on page 419 L. Ed.:

“Without the consent of the patient, the physician’s testimony is excluded with respect to two subjects: (a), any communication made by the patient with reference to any physical or supposed physical disease, and (b), any knowledge obtained by personal examination of such patient. And this privilege is waived, according to the terms of the proviso, only in the event that the patient offers himself as a witness and voluntarily testifies ‘with reference to such communications.’ We would have to ignore the plain meaning of the words in order to hold, as we are asked to do, that the testimony of other witnesses offered by the patient, or the testimony of the patient himself with reference to other matters than communications to the physician, or any averments contained in the pleadings, but not in the testimony, amount to a waiver of the privilege.”

Thus the Supreme Court held that the testimony of the patient as to his physical condition is not a waiver under the statute, but in order for a waiver to occur, the testimony of the patient must be as to the communications made by him to the physician.

But the only communications mentioned in the statute are communications as to “any physical or supposed physical disease.”

The language of the Supreme Court means that the latter part of this first sentence, namely “or any knowledge obtained by personal examination of such patient” must be read and construed in connection with the first part of this same sentence i. e. “as to any communications made by his patient *with reference to any physical or supposed physical disease.*” In short the latter expression merely serves to extend the first to physical examinations and does not introduce a new and unrelated subject matter i. e. personal examinations of every character and all sorts of patients. Note that the phrasing is “*any* knowledge obtained by personal examination,” not knowledge obtained by *any* personal examination; and in the same connection that the statute speaks of “*any* communication” with reference to “*any* physical or supposed physical disease.”

The question naturally comes to mind to whom do the words “such patient” in the expression “by personal examination of such patient” refer. Assuredly to “his patient” making communications “with reference to any physical or supposed physical disease.” The words “his patient” occur at one other point i. e. in the expression “without the consent of his patient.” But this is clearly parenthetical and likewise a reference to the same controlling language.

The use of a substituted phrase will frequently bring out more clearly the true meaning of ambi-

guous language. For instance, suppose the statute had stated that the physician could not be examined as to any communication made by his patient with reference to any physical or supposed physical disease or any knowledge obtained by personal examination *with reference to such disease*, instead of saying, as it does, “by personal examination *of such patient*.” Would there have been a material difference? “Such” is an adjective relating to some previous designation in the context. In the substituted language it refers to the disease as to which the communications are made by the patient. In the statute as it is it refers to the patient making the communications as to the disease: obviously the same thing.

Assume, for the purpose of argument, that the statute means that the physician cannot be examined with reference to any personal examination of the patient whatsoever; that the law applies to accidental injuries as well as disease, and observe into what a quagmire such a construction leads.

In the ordinary personal injury action, like the present case, where the question of disease is not involved the physician could then testify at will as to the communications made by the patient because the law establishes a privilege only with reference to communications as to disease; but the physician could not testify as to any knowledge obtained by a personal examination.

Apply the reasoning of the Supreme Court in the Clark case and we find that the patient could only be held to have waived the privilege by testifying as to communications. Could a trial court then say the

privilege cannot be waived in a case not involving disease because the Clark case holds that only testimony by the plaintiff as to communications amounts to a waiver, and the statute applies only to communications as to disease? The patient may testify without limit as to his physical condition or communications. There is no way he can waive the privilege. Without further analysis we will pass to the question of legislative intent.

The language of a statute controls in the absence of a clear legislative intent indicating that on the reason and policy of such legislation a broader construction should be resorted to.

Wellman vs. Bethea, 243 Fed. 222;

Sweet vs. United States, 228 Fed. 421;

Farmers' Loan and Trust Co., vs. Oregon & C. Railway Co., 24 Fed. 407.

To ascertain the intention of the legislature in the enactment of the statute, the Court may look to each part of the statute, to the evils and mischief to be remedied, and to the natural or absurd consequences of any particular interpretation.

Stockyards Loan Co. vs. Nichols, 243 Fed. 511;

Toledo Traction Light & Power Co. vs. Smith, 205 Fed. 643.

The privilege between physician and patient is a creation of the statute; it was unknown at common law.

“The statute is in derogation of the common law, and often excludes the best evidence. It should not, therefore, be extended to matters of

evidence not coming clearly within its provisions, as the object and purpose of all trials is the development of the true facts in each case.”

Missouri Pacific Railway Co. vs. Castle, 170 Fed. 841.

On principle, the confidential relation of physician and patient applies only to disease. Professor Wigmore's commentary is often quoted:

“(3) That the relation of physician and patient should be fostered, no one will deny. But (4) that the injury to that relation is greater than the injury to justice—the final canon to be satisfied — must most emphatically be denied. The injury is decidedly in the contrary direction. Indeed, the facts of litigation to day are such that the answer can hardly be seriously doubted. Of the kinds of ailments that are commonly claimed as the subject of the privilege, there is seldom an instance where it is not ludicrous to suggest that the party cared at the time to preserve the knowledge of it from any person but the physician. From asthma to broken ribs, from ague to tetanus, the facts of the disease are not only disclosable without shame, but are in fact often publicly known and knowable by every one—except the appointed investigators of truth. The extreme of farcicality is often reached in litigation over personal injuries,—in the common case, a person injured by a street car amid a throng of sympathizing onlookers. Here the element of absurdity will sometimes be double; in the first place, there

is nothing in the world, by the nature of the injury, for the physician to disclose, which any person would ordinarily care to keep private from his neighbors; and, in the second place, the fact which would be most strenuously secreted and effectively protected, when the defendant called the plaintiff's physician and sought its disclosure, would be the fact that the plaintiff was not injured at all! Upon such a foundation of vain imaginations is the privilege reared. The injury to justice by the repression of the facts of corporal injury and disease is a hundred fold greater than any injury which might be done by disclosure.*** Certain it is that the practical employment of the privilege has come to mean little but the suppression of useful truth,—truth which ought to have been disclosed and would never have been suppressed for the sake of any inherent repugnancy in the medical facts involved. Nine-tenths of the litigation in which the privilege is invoked consists of actions on policies of life insurance, where the deceased's misrepresentations of his health are involved; actions for corporal injuries, where the extent of the plaintiff's injury is at issue; and testamentary actions, where the testator's mental capacity is disputed. In all these the medical testimony is absolutely needed for the purpose of learning the truth. In none of them is there any reason for the party to conceal the facts, except to perpetrate a wrong upon the opponent. In the first two of these, the advancement of

fraudulent claims is notoriously common; nor do the culpable methods of some insurance or railway companies, whatever they have been or still are, justify the infliction or retaliatory punishment, indirectly and indiscriminately, by means of an unsound rule for the suppression of truth. In none of these cases need there be any fear that the absence of the privilege will subjectively hinder people from consulting physicians freely; the actually injured person would still seek medical aid, the honest insured would still submit to medical examination, and the testator would still summon physicians to his cure." *Wigmore on Evidence*, Vol. IV., pages 3351-2.

In *Edington vs. Aetna Life Insurance Company*, 77 N. Y. 564, (32 Sickles), it was said:

"The policy of the statute is to enable a patient, without danger of exposure, to disclose to his physician all information necessary for his treatment. Its purpose is to invite confidence and to prevent a breach thereof. Suppose a patient has a fever, or a fractured leg or skull, or is a raving maniac, and these ailments are obvious to all about him, may not the physician who is called to attend him testify to these matters? In doing so, there would be no breach of confidence, and the policy of the statute would not be invaded. These and other cases which might be supposed, while perhaps within the letter of the statute, would not be within the reason thereof. *Cessante ratione legis, cessat et ipsa lex.*"

The letter of the law and the spirit of the law argue to the same end: the statute should be held to apply only to physical or supposed physical diseases.

III.

Where the patient consents to an examination by a physician for the purpose of informing a third party of his injury, the relation of physician and patient is not established and the privilege does not apply.

It is error for the court to determine the facts as to whether the relation exists when it becomes necessary to weigh the evidence and pass on the credibility of witnesses. In such cases, the evidence should be admitted and go to the jury with proper instructions.

Where the court has passed on such facts, the evidence will be reviewed on appeal.

The burden of proving the confidential relation is on the party asserting the privilege, and it is error to exclude the physician's testimony when the evidence as to the confidential relation is evenly balanced.

The questions raised by specifications of error III, IV, V and VI are briefly set out in the above statement. The argument may be best pursued under this one head.

In the Clark case, *supra*, this court had before it the first proposition presented here, namely: that information secured for the benefit of a third person through a physical examination is not privileged under the Arizona Statute. In that case, the testi-

mony of the physician was excluded because it was not made clear to the patient that he was acting only as the agent of the defendant company and not also as the patient's own physician. Had the plaintiff in the Clark case clearly understood that the examination was made solely to inform the defendant company of the condition of his eye, and that fact been clear in the record, it is apparent, from the language of the opinion (207 Fed. 823), this court would have arrived at the opposite conclusion. The decision of the point turns on plaintiff's understanding of the purpose of the examination. Inferentially, then, that decision is authority here, thus holding that where the plaintiff is explicitly informed that the examination is for the purpose of advising the defendant company as to the injury, and he so understands it and consents, the privilege is not applicable, and the physician's testimony should be admitted in evidence.

This appeal presents just such a case. Later, in reviewing the evidence on which the trial court found the relation of physician and patient to exist, we will fully develop this point. For the present, in consideration of the unmistakable position of this court in the Clark case, it will suffice to refer to the following authorities holding that it is error to exclude the physician's testimony when the examination was for the purpose of informing a third party, and the patient so understood its purpose. We invite the attention of the court to the facts in the cases cited, and submit, in none of them was the purpose of the

examination and the patient's understanding of it clearer than on the facts of the record herein.

Chicago I. & L. Ry. Co. vs. Gorman, 47 Ind. App. 432, 94 N. E. 730;

Strafford vs. Northern Pac. Ry. Co., 95 Wash. 450, 164 Pac. 71;

McGinty vs. Brotherhood of Railway Trainmen, 166 Wis. 83, 164 N. W. 249;

People vs. Austin, 199 N. Y. 446, 93 N. E. 57;

Lynch vs. Germania Life Ins. Co., 132 App. Div. (N. Y.) 571, 116 N. Y. Supp. 988;

Heath vs. Broadway & S. A. R. Co., 29 N. Y. 267, 8 N. Y. Supp. 863.

See also discussion of subject in:

Battis vs. Chicago R. I. & P. Ry. Co., 124 Iowa 623, 100 N. W. 547;

Cherpeski vs. Great Northern Ry. Co., 128 Minn. 360, 150 N. W. 1091;

10 Encyclopedia of Evidence, Page 112;

Elliott on Evidence, Art. 634.

To pass to the next question:—It was error for the court to determine the issue as to whether the relation of physician and patient existed, involving as it did a weighing of the evidence and passing on the credibility of witnesses.

After defendant's witness, J. P. Hodgson, had testified that he sent plaintiff to Doctor Gray in El Paso for examination for the purpose of securing information as to the condition of plaintiff's left eye (Tr. p. 76), and that plaintiff consented to the ex-

amination knowing it was for such purpose (Tr. p. 77), and after Doctor Gray had testified that he made the examination with that understanding, an objection was interposed to the Doctor's testimony (Tr. p. 79). The court then called the plaintiff to the stand to get his version (Tr. p. 83). When plaintiff's statement had been made, the court held the evidence evenly balanced (Tr. p. 85) and excluded the physician's testimony (Tr. p. 87).

Defendant argued that there was nothing involved but weight and credibility; defendant having made out a *prima facie* case, and plaintiff's statement being rebuttal, the physician's testimony should be admitted and the whole matter go to the jury with proper instructions (Tr. pp. 86-87). Had there been no conflict of the evidence we readily admit the only question before the court would have been one of law—as to the competency of a witness—which upon all of the authorities is for the court. But when the preliminary question was resolved into the single inquiry—whose statement is correct, we submit it was for the jury.

In the case of *Hartford Fire Ins. Co. vs. Reynolds*, 36 Mich. 502, the question arose on the admissibility of testimony of an attorney against his client; the evidence was conflicting as to whether the relation of attorney and client existed. The court said:

“We do not think it improper to leave to the jury the question of the existence of such a relation when disputed. The judge may determine upon the statements of a witness himself whether he is competent or not; but it does not

properly belong to a judge to decide upon the truth of matters which have come out during the examination of witnesses who conflict. And it has been held that on an intricate question of fact the jury may very properly be consulted.—1 Edw. Ph. Ev., 4. We understand this to be correct practice, and in many cases to be the only safe rule for determining such questions. It is laid down very plainly by *Greenleaf*.—1 Gr. E., § § 49, 425.”

The preliminary question presented as to the voluntariness of a confession is closely analogous. In *United States vs. Oppenheim*, 228 Fed. 220, 223, it was said:

“But when it becomes a question of fact whether or not the confession or admission *was* voluntary the same is admissible in evidence, and the jury is to determine the fact and what credit they will give the statement made. *Wilson v. United States*, 162 U. S. 613, 624, 16 Sup. Ct. 895, 40 L. Ed. 1090; *Commonwealth v. Preece*, 140 Mass. 276, 5 N. E. 494; *People v. Howes*, 81 Mich. 396, 45 N. W. 961; *Thomas v. State*, 84 Ga. 613, 10 S. E. 1016; *Hardy v. United States*, 3 App. D. C. 35.”

The Circuit Court of Appeals for the Sixth Circuit, in passing on the same question in *M’Cool vs. United States*, 263 Fed. 55, 57, said:

“Whether confessions offered in evidence were voluntary is a question relating to the admissibility of evidence, and therefore a question for the trial court to decide upon the evidence of-

ferred; but where there is a conflict of evidence the confession may be submitted to the jury, under instruction to disregard it if 'it finds that it was not voluntary.' *Wilson v. United States*, 162 U. S. 613, 16 Sup. Ct. 895, 40 L. Ed. 1091. In this case the court not only found from the evidence that the confessions were voluntary and admitted the same, but also called the attention of the jury to this evidence, and instructed it to give to these confessions such consideration as in its opinion they might be worth."

See to same effect:

Wilson vs. United States, 162 U. S. 613, 40 L. Ed. 1090;

Commonwealth vs. Preece, 140 Mass. 276, 5 N. E. 494;

People vs. Howes, 81 Mich. 396, 45 N. W. 961;

Thomas vs. State, 84 Ga. 613, 10 S. E. 1016.

The rule is the same as to dying declarations. The following language from *State vs. Scott*, 37 Nev. 412, 142 Pac. 1053, is illustrative:

"It is not the province of the court to determine that a dying declaration has been made, but only that the preliminary evidence warrants the submission of that question to the jury. If the preliminary evidence clearly shows that the proposed declaration was not made in accordance with the rules rendering such a declaration admissible, it is, of course, the duty of the court to decide that the preliminary evidence offered is insufficient to warrant its submission to the

jury. If there is a substantial conflict in the evidence, the court should submit the whole matter to the jury under proper instructions. It is the province of the jury to finally determine from the evidence whether a dying declaration has in fact been made and the weight it is entitled to."

Other cases directly holding that on conflicting evidence the declaration should go to the jury are:

Meno v. State, 117 Md. 435, 83 Atl. 759;

State vs. Davis, 51 Oregon 136, 94 Pac. 44;

McCorquodale v. State, 54 Tex. Cr. R. 344, 98 S. W. 879;

Jackson v. State, 55 Tex. Cr. R. 79, 115 S. W. 263;

Johnson v. State, 218 S. W. 496, (Tex. Not yet officially reported);

People vs. Kulia Singh, 188 Pac. 987, (Cal. Not yet officially reported).

But irrespective of whether the court erred in withholding the preliminary question from the jury, having passed on the question, its conclusion is reviewable on appeal. This court should in such a state of the record determine upon an investigation of the evidence on the point whether there is sufficient foundation to support the ruling, in the same manner that in a proper case the whole record would be searched under the assignment, the evidence is insufficient to support the verdict.

It is only necessary to refer to the decision in *Arizona & N. M. Ry. Co. v. Clark*, *supra*. On that occas-

sion this court fully reviewed the record on the identical question presented here.

The Supreme Court of the United States has laid down the rule for the review of the trial court's finding on a preliminary question of fact in *Gila Valley G. & N. R. Co. v. Hall*, 232 U. S. 102, 58 L. Ed. 521, saying that such a finding is not subject to be reversed on appeal or error *if it be fairly supported by the evidence*. (Italics ours).

The scope of review is well stated in *State v. Zorn*, 202 Mo. 12, 100 S. W. 591, where the question arose on the excluding of a dying declaration:

"Upon this appeal, it is clearly the duty of this court to review the action of the trial court upon the subject of dying declarations, their admissibility, etc., and the very first question which confronts the court upon this appeal is as to the sufficiency of the basis of foundation laid upon the preliminary inquiry to authorize their admission in evidence. In reviewing the testimony which constitutes the basis for the admission of the dying declarations in this cause, this court must consider the entire testimony."

On the question of review see also:

Commonwealth v. Johnson, 158 Ky. 579;

Gardner v. State, 55 Fla. 25, 45 So. 1028;

State v. McComer, 79 S. C. 63, 60 S. E. 237;

Malone v. State, 72 Fla. 28, 72 So. 415;

State v. Marshall, 98 S. E. 130, (S. C. Not yet officially reported).

We do not think it can be said that the finding that the relation of physician and patient existed between

defendant's witness, Doctor Gray, and the plaintiff is "fairly supported by the evidence."

Turning to the record we find defendant's witness, J. P. Hodgson, stated that plaintiff came to see him at his office about the supposed injury (Tr. p. 75), around the 25th of February, 1919 (Tr. p. 76), which was about a month after the date ascribed to the injury. He saw the plaintiff seven or eight times in the course of two months and a half (Tr. p. 76). Plaintiff had been under treatment by Doctor Rice and Doctor Blatherwick, both company physicians (Tr. p. 76).

For convenience we quote the testimony of the manager of the defendant company directly on this point:

"He afterwards returned to Morenci. (After Phoenix trip). He came into my office and we had a discussion, talked the matter over, and I told him I was willing to send him to any specialist or specialists for a careful examination, if he cared to go.

Q. What was the purpose of these different examinations to be made?

A. So as to be absolutely sure from those specialists that he had really received an injury that had injured his eye, I would settle with him."

Q. You had in mind getting information?

A. Yes, sir.

Q. To act upon? A. Yes, sir.

Q. The plaintiff consented to that?

A. Yes, sir.

Q. What specialist did you conclude to send him to?

A. Dr. Detweiler, and I asked in a letter to Doctor Detweiler to also get another specialist and make a report of the condition, but not treat him at all.

Q. The plaintiff understood, and was assured that that was what you wanted, this information?

A. Yes, sir.

Q. Did the plaintiff go then on his trip to El Paso? A. Yes, sir.

Q. You afterwards received a report upon him?

A. I did.

Q. Now, who arranged with the doctors themselves to make the examination, and who paid them for making it?

A. I arranged by correspondence with the doctors, and we paid the—the company paid the expenses both of Mr. Guerrero's trip to and fro, and the doctors' expenses, too.

Q. You made the arrangement on behalf of the company? A. Yes, sir.

Q. And received the information that they furnished you? A. Yes, sir."

Plaintiff's counsel did not cross examine this witness. The fact is significant.

Doctor Gray corroborated the witness as to the fact of the examination, that plaintiff was sent to him by the defendant company, and the defendant company paid for the examination (Tr. p. 78-79).

On direct examination plaintiff testified:

“The doctor boss foreman sent me to Phoenix. They gave me a letter to take to the doctor. I found the doctor at Phoenix. That doctor only examined my eyesight, that is all (Tr. p. 43-44). After they had me there at Morenci, there in the hospital twenty-five days and treated me twenty-five days, they sent me—the boss doctor there at Morenci sent me to El Paso again to another doctor in El Paso (Tr. p. 44). He also examined me and that is all he done to me (Tr. p. 44). They did not give me any letters; they just sent me back to Morenci. I went back to Morenci. They did not treat me. I used to go over to the doctor at Morenci and put some drops in my eye; that is all he did. He didn’t give me any treatment.” (Tr. P. 44).

On cross examination plaintiff stated “This Phoenix doctor did not treat me. He only put some drops and examined my eye and that is all he done to me.” (Tr. p. 49-50).

In speaking of the El Paso examination he said “Only one doctor examined me. He examined me two times.” (Tr. p. 51).

Plaintiff was then asked:

“Q. Are you willing to submit yourself to an examination by physicians to be appointed by this Court to examine your eye and report to the Court and the Jury the true condition of your eyesight at this time?

A. He says, “I have been examined; what more examination do you want?”

Q. Are you willing to submit to the kind of examination I mention?

A. He says, "I have been suffering; no sir; I have been suffering so long, what is the use of having that examination?"

Q. Then you don't want to be examined any more? A. No, sir."

The same question was put to plaintiff's counsel. Mr. Kearney replied "We have no objection to submit." (Tr. p. 52). Mr. Dunseath said "If this man is not suffering from an injury, we want to know it." (Tr. p. 52).

On cross examination plaintiff testified that the same doctor sent him to El Paso that sent him to Phoenix (Tr. p. 50). He was asked:

"Do you know Captain Hodgson, the manager of the defendant company at Morenci?"

A. He says, "they have a captain and also another one and I don't know which one of the captains it was."

(Tr. p. 50).

He was again asked and said he did not know Mr. Hodgson.

When the Court called plaintiff to the stand, plaintiff said he understood he was being sent to El Paso to benefit his eye, that he was to receive treatment for his eye (Tr. p. 83). However, he also stated, "They did nothing but examine me." (Tr. p. 83). He was asked by the Court what conversation he had with Mr. Hodgson about the matter. He replied, "Nothing." In his next answer he admitted he had requested a settlement of him. He stated a second

time that Mr. Hodgson had told him nothing. The question was reframed but he did not seem to understand it. The interpreter repeated it, his response was "He only examined my eye, but he never told me anything." It was apparent the plaintiff did not comprehend. The Court asked the question for the fifth time (Tr. p. 85). Plaintiff replied, "He didn't tell me nothing." The Court ruled, excluding the evidence.

It is clear the trial court regarded what the patient said as tipping the scales or, rather, balancing them, to be exact. The question was wholly one of credibility. The true test is by no means what plaintiff said, but what the fact was in view of all the evidence before the Court. What plaintiff said was a single fact to be weighed with all other relevant evidence. It was not the final fact.

On the one side, the Court had the direct unequivocal testimony of the defendant's manager (Tr. p. 77) and plaintiff's failure to question by cross examination his statement as to plaintiff's consent (Tr. p. 78); plaintiff's admission that he was sent to El Paso with a letter from the defendant company to the doctor (Tr. p. 50), that he was examined, that he was not treated (Tr. p. 44); plaintiff's flat refusal in court to submit to an examination of his eye (Tr. p. 52); his counsel's statement that they wanted to know if he were not suffering from an injury (Tr. p. 52); the failure of plaintiff's doctor to make any attempt to standardize plaintiff's vision because he was not requested by plaintiff or his attorneys (Tr. p. 56, p. 61), though the action was for nothing but

loss of vision (Tr. p. 10); the fact that the doctors reported to defendant (Tr. p. 77), and the doctors were present at the trial as defendant's witnesses.

On the other side, there is first, plaintiff's denial that he knew Mr. Hodgson (Tr. p. 50), then his admission that he talked to him about settlement (Tr. p. 84), his constant repetition that he was not treated, only examined, his complete switch when recalled to the stand, saying he went to El Paso to benefit his eye (Tr. p. 83); and last, his statement "He didn't tell me nothing." (Tr. p. 85).

The situation is different than it was in the Clark case. There is no bedside confidence; no visit of the physician to the patient at the time of the injury. Plaintiff came many times to defendant's office to talk of his injury. Doctor Gray's examination was made weeks after the date of injury, and plaintiff traveled many miles to see him (Tr. p. 78).

In order for the Court to accept plaintiff's version, it was necessary to discount plaintiff's vital interest in the result, the apparent discrepancies in his statements, the fact that he did not have his vision measured by his own physician, his unwillingness to submit to examination by a physician chosen by the Court, his counsel's comment when the question was put to them, and their failure to cross examine defendant's witness, Mr. Hodgson. It was likewise necessary to ignore the plain statement that plaintiff consented, by Mr. Hodgson, and to discover in the evidence a satisfactory explanation of why the plaintiff would go to El Paso and voluntarily submit to an examination (not treatment) the result of which

he would not know (Tr. p. 44); conduct which we confidentially feel on all the evidence can be accounted for only on the theory that it was done for the purpose of informing the defendant as to the extent of plaintiff's vision.

The Court's ruling cannot be said to be "fairly supported by the evidence."

Whatever may be this court's conclusion on a review of the evidence, the exclusion of the physician's testimony after holding the evidence on the preliminary question evenly balanced, was the clearest error. The court said, "Well, the evidence in the matter being evenly balanced; I feel that I ought to sustain the objection." This was no casual expression or comment in passing; it was the deliberate and formal ruling of the court after hearing both parties and defendant's case was virtually wiped out by it. The evidence should have been admitted when it was not shown by a preponderance of evidence that the relation of physician and patient existed. A discussion of cases is unnecessary, the law is that the party asserting the privilege has the burden of proof.

Shuttlefield vs. Neil, 163 Iowa 470, 145 N. W.

1;

Booren vs. Mc Williams, 26 N. D. 558, 145 N. W. 410;

Sharon vs. Sharon, 79 Cal. 633, 22 Pac. 26, 131;

Bowles vs. Kansas City, 51 Mo. App. 416;

Henry vs. New York, L. E. & W. R. Co., 32 N. Y. St. Rep. 16, 57 Hun. 76, 10 N. Y. Supp. 508;

Earl vs. Grout, 46 Vt. 113;

Phelps, et al. vs. Root, 78 Vt. 493, 63 A. 941;
Stoddard vs. Kendall, 140 Iowa 688, 119 No.
 W. 138;

People vs. Austin, 199 N. Y. 446, 93 N. E. 57;
Chicago, I. & L. Ry Co. vs. Gorman, 47 Ind.
 App. 432, 94 N. E. 730;

People vs. Schuyler, 106 N. Y. 304, 12 N. E.
 783;

Griffith vs. Metropolitan Ry. Co., 171 N. Y.
 106, 63 N. E. 808;

Edington vs. Aetna Life Ins. Co., 77 N. Y.
 564, (32 Sickels);

Moyers vs. Fogarty, 140 Iowa 701, 119 N. W.
 159;

In re. Niday, 15 Idaho 559, 98 Pac. 845;
 IV *Wigmore on Evidence*, § 2381.

IV.

The Court erred in holding the followin questions privileged:

What part of the examination did you conduct, and what part did Doctor Detweiler conduct?

Did you and Doctor Detweiler, or either of you, on this occasion, make a test of the plaintiff to ascertain whether or not he really was blind in his left eye?

Did you and Doctor Detweiler, or either of you, on that occasion apply the scientific tests for the purpose of ascertaining whether or not the plaintiff's left eye was normal or abnormal?

And on the same occasion, did you also make an examination of the plaintiff's right eye?

As a result of that whole examination made by yourself and Doctor Detweiler, did you reach a conclusion as to the condition of the plaintiff's eyes?

Under this head we have combined the questions raised by specifications of error VII, VIII, IX, X and XI, because the same argument is to be advanced in support of all. The briefest consideration will demonstrate that each of these questions was preliminary and that we were entitled to an answer to each of them, yes or no in each case.

Questions of this nature have invariably been held proper.

Missouri Pac. Ry Co. vs. Castle, 172 Fed. 841, (8th Circuit). Where the inquiry was as to how patient lost his leg.

Higgs vs. Bigelow, 39 S. D. 359, 164 N. W. 89. Question as to value of services of nurse.

Haughton vs. Aetna Life Ins. Co., 165 Ind. 32, 73 N. E. 592. Physician testified as to his employment.

Nelson vs. Nederland Life Ins. Co., 110 Iowa 600, 81 N. W. 807. Physician testified he was consulted and prescribed.

Price vs. Standard Life & Acc. Co., 90 Minn. 264, 95 N. W. 1118. Physician testified to number of visits.

Deutschman vs. Third Avenue Ry. Co., 78 App. Div. 503, 84 N. Y. S. 887. Physician testified to place and length of treatment.

Becker vs. Metropolitan Life Ins. Co., 99 App. Div. 5, 90 N. Y. S. 1007. Physician testified to

length of illness of patient, number and dates of visits.

Chadwick vs. Beneficial Life Ins. Co., 181 Pac. 448, (Utah. Not yet officially reported). Physician testified patient had consulted him.

Dovich vs. Chief Con. Mining Co., 174 Pac. 627, (Utah. Not yet officially reported). Physician testified length of time patient was under anesthetic.

And on appeal or error it will be concluded that the answer solicited would have been favorable to the party propounding the question. In the case of *Buckstaff vs. Russell & Co.*, 151 U. S. 627, 38 L. Ed. 292, Mr. Justice Harlan said:

“If the question is in proper form and clearly admits of an answer relevant to the issues and favorable to the party on whose side the witness is called, it will be error to exclude it. Of course, the court, in its discretion, or on motion, may require the party, in whose behalf the question is put, to state the facts proposed to be proved by the answer. But if that be not done, the rejection of the answer will be deemed error, or not, according as the question, upon its face, if proper in form, may or may not clearly admit of an answer favorable to the party in whose behalf it is propounded. ”

It was error to exclude the answers to these questions. A previous ruling of the court had excluded all of the physician's testimony within the privilege. Under the circumstances, the importance of the de-

fendant showing the jury; that Doctor Gray made a test of the plaintiff to ascertain whether or not he really was blind in his left eye; that Doctor Gray on that occasion applied scientific tests to determine whether or not plaintiff's left eye was normal or abnormal; that Doctor Gray also examined plaintiff's right eye, what part of the examination was made by Doctor Gray and what part by Doctor Detweiler; and as a result of the whole examination, whether Doctor Gray and Doctor Detweiler reached a conclusion as to the condition of plaintiff's eyes, will be fully appreciated. These answers were all that was left of our defense; they were vital and that their exclusion was prejudicial does not call for argument.

CONCLUSION

Plaintiff's claim is that he has been blind in his left eye from the date of the accident (Tr. p. 54). As was stated at the outset, our position is that plaintiff is an impostor. Plaintiff took shelter under the privilege and we did not prove that he was. The court appointed an impartial physician to examine his eyes, but the physician could not state what his vision was because plaintiff would not answer questions or otherwise cooperate (Tr. p. 105, p. 109).

That the court misconstrued and misapplied the statute, thus erroneously excluding our proof we think is clear. Our defense did not go to the jury. If there is error, it is prejudicial.

The judgment should be reversed.

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JOHN MASON ROSS,

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JOHN E. SANDERS,

Attorneys for Plaintiff in Error.

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT.

HELPS DODGE CORPORATION, A CORPO-
RATION,

Plaintiff in Error—Appellant,

v.

PIFANIO GUERRERO,

Defendant in Error—Respondent.

No. 3591.

UPON WRIT OF ERROR TO THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF ARIZONA.

BRIEF FOR DEFENDANT IN ERROR.

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FILED
FEB 14 1937
U. S. DISTRICT COURT
TUCSON, ARIZONA

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT.

HELPS DODGE CORPORATION, A CORPO- RATION, <i>Plaintiff in Error—Appellant,</i> v. PIFANIO GUERRERO, <i>Defendant in Error—Respondent.</i>	}	No. 3591.
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UPON WRIT OF ERROR TO THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF ARIZONA.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

This action was brought in the United States District Court for the District of Arizona, under the provisions of Chap. 6, Title 14, Revised Statutes of Arizona, Civil Code, 1913, known as the "Employers' Liability Law," to recover damages for injuries to the eyes of plaintiff, sustained while in the employ of defendant in one of its mines, and which action resulted in a judgment in favor of plaintiff for \$2,750.00 and \$43.05 costs, and from this judgment this appeal is prosecuted.

The appeal is taken on questions of privileged communications between patient and physician, and the refusal of the court to give a cautionary instruction requested by defendant.

Appellant has several assignments of error on privileged communication, all of which are restatements of but one assigned error, except an assignment of error on the refusal of the court to give a requested special cautionary charge on privileged communication.

As all of the assigned errors are but a restatement of the first, except the special charge requested by appellant, they may for the sake of brevity be treated as but one assignment.

It is also claimed that the court should not have passed on the question of privileged communication, but should have submitted that matter to the jury to say whether or not the relation of patient and physician existed.

All questions on this appeal arise under the provisions of subdivision 6 of paragraph 1677, Revised Statutes of Arizona, Civil Code, 1913, is as follows:

(6) "A physician or surgeon cannot be examined, without the consent of his patient, as to any communication made by his patient with reference to any physical or supposed physical disease or any knowledge obtained by personal examination of such patient; provided, that if a person offer himself as a witness and voluntarily testify with reference to such communications, that is to be deemed a consent to the examination of such physician or attorney."

The testimony plainly shows that the doctors, Rice, Gray, Detweiler and Stark, were employed by defendant corporation, but in the treatment of plaintiff's eye they were also his physicians, and that the relation of physician and patient existed between those doctors and the plaintiff.

In the course of the trial, several times the court was necessarily called upon to pass on the question whether or not the relation of patient and physician existed between those doctors and the plaintiff, and on each occasion the court held that such relation did exist and refused to permit the doctors called by defendant to testify as to what

they found by examination and treatment of plaintiff's eye.

Appellant contends that the court erred in such rulings, and that it ought to have submitted such questions to the jury to pass on—let in all offered testimony, and at the close of the trial submit a special interrogatory to the jury as to whether or not such relation existed, under a special instruction. If the lower court had done what the appellant wanted it to do, the statute on privileged communications would have been wiped out and rendered a dead letter.

On direct examination the plaintiff testified:

“The doctor treated me at that time. I used to go to the doctor about every other day. I went to him for eight days and then he put some kind of water that was too strong in my eye, or something, and from there they sent me to Phoenix.” (Transcript p. 43.)

“I used to go over to the doctor at Morenci and put some drops in my eye; that was all he did. He didn't give me any treatment.” (Transcript p. 44.)

From these statements it is contended that plaintiff has waived the privilege and the doctors are at liberty to testify to privileged matters.

The question what constitutes a waiver has many times been considered by the courts and many diverging views have been announced. Some cases hold that if plaintiff testifies as to his injuries or sets them up in his pleadings or states that a named doctor treated him or states for what ailment he was treated, then, in either instance, the privilege has been waived. It will be noticed that such decisions were not made under a statute the same as Arizona, but are founded more on the common law principles of evidence than upon any particular statutory regulation. Most statutes on the question do not state what does constitute a waiver, and for that reason the courts seek enlightenment from the general rules of evidence, as shown in the case of *Burgess v. Sims Drug Co.*, 114 Iowa 275, 86 N. W. 309, second column, where the court said:

“It is proper to suggest further that the statute does not specify what shall constitute a waiver, leaving

that to be determined by the general rules of evidence, which, without statutory authority, had previously been recognized as applicable to communications between client and attorney."

On cross examination the plaintiff testified:

"Q. What day was it he put this strong medicine in your eye, the first day or some day later? A. He says he treated him for some days with some black medicine that he put in my eye, and on one of those days he went over there and he dipped a little piece of stick and a little cotton on the end of that stick and he put it into a bottle, and when he come out with it it was smoking, and then he put it in my eye, it burned like everything. It was pretty strong for my eye." (Transcript pp. 48-49.)

It cannot be claimed that plaintiff waived the privilege by testifying on cross examination, for it is essentially not voluntary.

In case of *Burgess v. Sims Drug Co.*, 86 N. W. 309, the court said:

"If counsel saw fit on cross examination to inquire into this matter, he must be bound by the answer, and cannot afterwards claim that the witness, by answering without objection, voluntarily waived the privilege."

To same effect, that matters brought out on cross examination do not waive the privilege, see

Hirschberg v. Southern Pac. Co., 183 Pac. 144, 2d column (Cal.).

Plaintiff did not testify to any communication whatever between him and his physicians; those were new matters, not brought out on direct examination of the plaintiff and which the defendant had not the right to go into on cross examination.

Defendant has several thousand employees, and has many doctors in its employ. It selects the physicians and a certain sum is taken out of the pay check of each employee

each month, which is used to pay salaries of doctors and hospital upkeep.

“Confidential communications by a patient to a physician are not less privileged because the relation is established at the request of a third person.”

Union Pac. R. Co. v. Thomas, 152 Fed. 367, C. C. A.

Privileged communication—question for the court:

“Whether or not the circumstances are such as to make the rule or privilege applicable in a particular case is a question for the court.”

23 Am. & Eng. Ency. Law, 2nd Ed. 71;

40 Cyc. 239;

Potter's Dwarris' on Statutes, p. 202.

Upon a conflict of evidence, whether such relation does or does not exist, the decision of the trial judge must be deemed conclusive.

Harris v. Daugherty, 11 S. W. (Tex.) 923, first column;

In re Myer's Estate, 10 Pac. (Cal.) 711;

Childs v. Merrill, 66 Vt. 434, 29 Atl. 532;

State v. Louani, 79 Vt. 463, 65 Atl. 532, 9 Ann. Case 194;

Hughes v. Boone, 102 N. Car. 137, 9 S. E. 286;

People v. Atkinson, 40 Cal. 284;

Arizona & N. M. Ry. Co. v. Clark, 207 Fed. 821;

Ariz. Cop. Co. v. Burciago, 20 Ariz. 85, 177 pp. 30-31, para. 1.

In case of *Arizona & N. M. Ry. Co. v. Clark*, 235 U. S. 669, 59 L. Ed. 415, we are furnished a construction of the Arizona statute under consideration, and in which the court states that the Arizona statute is different from the statutes of other states and that the decisions on other statutes are “valueless as guides to the meaning of the statute here in question (Arizona), but the very fact that the legislature of Arizona departed from the form of the New York statute indicates that it did so because it had a different purpose to express.”

Again in this case the court said:

“And this privilege is waived, according to the terms of the proviso, only in the event that the patient offers himself as a witness and voluntarily testifies *with reference to such communications*.

It contemplates that the patient may testify with reference to what was communicated by him to the physician, and in that event only it permits the physician to testify without the patient’s consent.

In order to prevent the patient from being subjected to this disadvantage, the act gives him the option of excluding *the physician’s evidence entirely by himself refraining from testifying voluntarily as to that respecting which alone their knowledge is equal, namely, what the patient told the physician with reference to the ailment.*” (Italics ours.)

Recently this identical question was passed upon by the Supreme Court of Arizona, case *Arizona Eastern R. Co. v. Matthews*, 180 Pac. 159, gist 164, in which the court holds that the ban of secrecy is not raised, nor privilege waived, so long as the patient does not voluntarily testify as to what he “told the physician with reference to his ailment,” and that “the patient can object to the physician testifying as to what he may have learned in his professional capacity unless the patient has himself” testified to the communications he made to the physician. “*It not appearing that the appellee testified to any communications made by him to the physicians, he did not waive his right to object to their testifying.*” (Italics ours.)

Even if the plaintiff did testify that he went to see Dr. Rice and that this doctor had treated him, and “put some kind of water in his eye that was too strong” (Tr. p. 43), he did not waive his privilege to object to the doctor’s testimony, because he had not “*testified to any communications he made to this physician.*”

The record in this case fails to show that plaintiff testified to any communications made by him to any of the physicians.

Under the Michigan statute on privileged communications, in case of *Slater v. Sorge*, 131 N. W. 565, the court

had the same proposition under consideration, in which it was shown that plaintiff in that case had testified in his own behalf:

“I caught a car and came over to Dr. Taber’s office in Benton Harbor. I showed him my hand and walked the floor and halls until he got to it. He treated the hand; put medicine on it. I went to Dr. Taber’s again. He saw it the day of the injury and the next day and the following Sunday, three days in succession.”

In this Michigan case, Dr. Taber was called as a witness by defendant. Plaintiff objected on ground of privileged relation. The defendant contended that because plaintiff had testified that he had showed Dr. Taber his hand that Dr. Taber had treated it and put medicine on it that plaintiff had waived the privilege, but the court held that there had been no waiver and refused to permit the doctor to testify.

In case *Indianapolis & M. Rapid Transit Co. v. Hall*, 76 N. E. 242 (Ind.), the court said:

“The fact that the plaintiff had testified that she had sustained injuries, and that she called Dr. Herr and that he had prescribed for her back and side did not justify the admission of the evidence of the physician as to what he had or had not discovered as the result of an examination of the plaintiff’s person.”

When the Clark case was before this court, 207 Fed. 821, in construing the Arizona statute on privileged communications, this court said:

“Such statutes are designed to protect the patient and should be liberally construed to that end.”

The best construction of the Arizona statute on privileged communications is to be found in the Clark case only, in the 207 F. 821 and 235 U. S. 669, 59 L. Ed. 415, and *Ariz. E. R. Co. v. Matthews*, 180 P. 159.

Generally on the question of privileged communication:

“A physician sent by an officer of a defendant corporation in a personal injury case to examine the plaintiff, although for the purpose of obtaining evidence, and the patient believes that the doctor was called for the purpose of treating him and submits to an examination under such belief, the knowledge and information so obtained is privileged.”

Munz v. Salt Lake City Ry. Co., 70 P. (Utah) 852;
1 Elliott on Evidence, p. 741, Sec. 634;
Underhill on Crim. Evi., 2nd Ed., Sec. 179.

“Information obtained by trick, deception, misrepresentation, or any other means whereby the patient is made to believe that the examination is made for his benefit, the information so obtained is privileged.”

The People v. Ira Stout, Parker's Criminal Reports (N. Y.), Vol. 3, pp. 670, 675; affirmed in *People v. Austin*, 93 N. E. 59.

“A physician called in by an attending physician or by friends, or by strangers, and who makes an examination of the patient or learns from the patient the nature of his injuries, such knowledge and information are privileged and the physician cannot give testimony of the same.”

Reinhan v. Dennin, 9 N. E. (N. Y.) 320, 322;
Union Pac. R. Co. v. Thomas, 152 Fed. 365;
People v. Murphy, 4 N. E. 326.

“If a physician attends a person under circumstances calculated to produce the impression that he does so professionally, and his visit is so regarded and acted upon by the person, it is enough to establish the relation.

These statutes are designed to protect the patient, not the physician, and, being remedial in their nature,

ought to receive a liberal construction which will fully effectuate their wise and humane provisions.”

Underhill on Crim. Evi., 2nd Ed., Sec. 179, p. 341;
Freel v. Market St. Cable Ry. Co., 97 Cal. 40;
 23 Ency. L., 2nd Ed., pp. 84, 85.

Under assignment IX it is claimed the court erred in refusing to give appellant's requested instruction, which in effect singled out a particular fact and asked the court to tell the jury that because the plaintiff on objection had excluded the testimony of defendant's physician, who had treated him, on the ground that such testimony was privileged, was a fact to be considered by the jury in weighing the plaintiff's testimony and in judging of the truth of the story he told. This matter was fully covered in the court's general charge to the jury. (Transcript pp. 121-122.)

It is held in case of *Wood v. Los Angeles Trac. Co.*, 1 Cal. App. 474, 82 Pac. 547, that it is not error to refuse to give such cautionary instructions, because they lead the jury to infer that the court has a poor opinion of such evidence and that such charges deal with the weight of the evidence—matters for the jury to determine.

This court in construing this statute in case *Arizona & N. M. R. Co. v. Clark*, 207 Fed. 821, said:

“Such statutes are designed to protect the patient and should be liberally construed to that end.”

To sustain the contention of the appellant that such instruction should have been given would amount to little less than a repeal of the statute. “To claim the protection of this statute is the legal right of a patient of no less inviolability than any other personal right, and it is wholly inconsistent with that right to say that its exercise in a judicial proceeding shall be allowed to prejudice the cause of him who claims it.” Such cautionary instructions should not be given, nor should the counsel be permitted to make unfavorable comments to the jury on the failure of the plaintiff to call such witnesses.

Brackney v. Fogle, 156 Ind. 533-5, 60 N. E. 303.

Counsel have no right to ask the witness if he is willing that physician who treated him testify in the case. Such questions are prejudicial error, nor has counsel the right to argue to the jury the fact that plaintiff refused such consent.

McConnell v. City of Osage, 80 Iowa 293, N. W. 550;

William Laurie v. McCullough, 90 N. E. (Ind.) 1014, 1017;

Burgess v. Sims Drug Co., 114 Iowa 275, 86 N. W. 309, 2nd column, 22 C. J. 125, Sec. 59, states the rule:

“The more generally accepted view is that no unfavorable inference arises from a party’s failure to produce, or refusal to consent to the admission of, testimony of a witness as to privileged communications between himself and such party.”

It is generally held that a party may take advantage of a communication as privileged and object to testimony in regard thereto without any unfavorable presumptions or inference arising against him.

Graves v. United States, 150 U. S. 118, 37 L. Ed. 1021;

Pennsylvania R. Co. v. Durkee, 147 Fed. 99, 78 C. C. A. 107, 8 Ann. Cas. 790;

William Laurie v. McCullough, 90 N. E. (Ind.) 1014;

Cook v. Los Angeles, 169 Cal. 113, 145 p. 1013;

Nat. German-American Bank v. Lawrence, 77 Minn. 282, 79 N. W. 1016;

Johnson v. State, 63 Miss. 313;

Arnold v. Maryville, 110 Mo. A. 254, 85 S. W. 107;

Lane v. Spokane Falls, 21 Wash. 119, 57 p. 367, 75 Am. S. R. 821, 46 L. R. A. 153;

Eng.-Wentworth v. Lloyd, 10 H. L. Cas. 589, 11 Reprint 1154;

Rump v. Woods, 50 Ind. A. 347, 98 N. E. 369.

Some reasons for the rule are given in *Johnson v State*, 63 Miss. 313.

INTEREST ON JUDGMENT.

Paragraph 3161, Chap. VI, Title 14, Revised Statutes of Arizona, Civil Code, 1913, is as follows:

3161. "In all actions for damages brought under the provisions of this chapter, if the plaintiff be successful in obtaining judgment, and if the defendant appeals to a higher court, and if the plaintiff in the lower court be again successful, and the judgment of the lower court be sustained by the higher court or courts, then, and in that event, the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of twelve per cent per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid."

The printed transcript in this case, page 6, shows that the complaint was filed in the lower court on June 19, 1919. The amount of the judgment in this case is \$2,793.05, and in case this judgment is affirmed, we request this court to add twelve per cent interest thereon from June 19, 1919, until paid.

This provision of the Arizona statute has had the consideration of the Supreme Court of the United States and held valid.

Arizona Copper Co. v. Hammer, 250 U. S. 434, 63 L. Ed. 1072, 2nd column.

Respectfully submitted,

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United States
Circuit Court of Appeals
For the Ninth Circuit.

LEMUEL S. FOWLER and THOMAS SINGER,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writs of Error to the United States District
Court of the Western District of Washington,
Northern Division.

FILED
DEC 24 1920
F. D. MONCKTON,
CLERK.

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United States District Court, Western District of
Washington, Northern Division.

November Term, 1919.

No. 5249.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEMUEL S. FOWLER, GEORGE E. WHITE,
CLARENCE H. BELLAMY, ALBERT
BRUCE PARIS, THOMAS E. JONES, ED-
WARD BOURDELL, SARAH JONES,
JOE VEAGUS, HERBERT WILLIAM
HANSON, ETHYL HANSON, WILLIAM
RATCLIFF, JAMES FRANCIS MELLI-
SON, THOMAS SINGER, DAVID JONES,
CREED LANE, GEORGE H. TREPANIER
and MRS. J. A. LEWIS,

Defendants.

Indictment.

The United States of America,
Western District of Washington,
Northern Division,—ss.

The grand jurors of the United States of America having selected, impaneled, sworn and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present:

COUNT I.

That on, to wit, the 30th day of March, 1918, and Continuously thereafter to the time of the presentment of this indictment, at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, Lemuel S. Fowler, George E. White, Clarence H. Bellamy, Albert Bruce Paris, Thomas E. Jones, Edward Bourdell, Sarah Jones, Joe Veagus, Herbert William Hanson, Ethyl Hanson, Creed Lane, William Ratcliff, James Francis Mellison, Thomas Singer, David Jones, George H. Trepanier and Mrs. J. A. Lewis, have knowingly, wilfully, unlawfully, corruptly and feloniously combined, conspired, confederated and agreed [1*] together, and one with the other and together, and with divers other persons to the grand jurors unknown, all of the said defendants herein above named, and said other persons unknown, being hereinafter called the conspirators, to commit an offense

*Page-number appearing at foot of page of original certified Transcript of Record.

against the United States, that is to say, to violate Section 1 of the Act of Congress approved February 13th, 1913, entitled "An Act to punish the unlawful breaking of seals of railroad cars containing interstate or foreign shipments, the unlawful entering of such cars, the stealing of freight and express packages or baggage or articles in process of transportation in interstate shipment, and the felonious asportation of such freight or express packages or baggage or articles therefrom into another district of the United States, and the felonious possession or reception of the same," it being then and there the plan, purpose and object of the said conspiracy, and of the said conspirators, that they, the said conspirators, should and would knowingly, wilfully, unlawfully and feloniously break the seals of said railroad cars containing interstate and foreign shipments of freight and express with the unlawful and felonious intent then and there on the part of the conspirators, and each of them, to commit larceny in said certain cars; it being then and there the further plan, purpose and object of the said conspiracy, and of the said conspirators, that they, the said conspirators, and each of them, should and would knowingly, wilfully and unlawfully enter certain railroad cars then and there containing interstate and foreign shipments of freight and express with the unlawful and felonious intent then and there on the part of the said conspirators, and each of them, to commit larceny in said cars; and it being then and there the further plan, purpose and object of the said conspiracy, and of the said conspirators, that they the

said conspirators should and would knowingly, wilfully, unlawfully and feloniously steal, take, carry away and conceal, and by fraud [2] and deception obtain from certain railroad cars, railroad station-houses, railroad platforms and railroad depots, with the unlawful and felonious intent then and there on the part of said conspirators, and each of them, to convert to the own use of said conspirators, and each of them, certain goods and chattels, of value then and there moving as interstate and foreign shipments of freight and express, and then and there being a part of and constituting interstate and foreign shipments of freight and express, all as the said conspirators then and there well knew and should and would well know at the time and in the execution of the said conspiracy and the object thereof; it being then and there the further purpose, plan and object of the said conspiracy and of the said conspirators that they the said conspirators, and each of them, would and should knowingly, wilfully, unlawfully and feloniously buy, receive, conceal and have in the possession of the said conspirators, and each of them, certain goods and chattels of value, which said goods and chattels prior to said buying, receiving, concealing and possessing by the said conspirators as aforesaid had been and would have been knowingly, wilfully, unlawfully, and feloniously stolen, taken, carried away and obtained by fraud and deception from certain railroad cars, railroad station-houses, railroad platforms, and railroad depots, with the intent then and there on the part of such person so stealing, taking, carrying away and obtaining said goods and

chattels to convert the said goods and chattels to his own use, and the said goods and chattels when so stolen, taken, carried away and obtained, being then and there moving as and part of and constituting certain interstate and foreign shipments of freight and express, that they the said conspirators, and each of them, then and there well knew and would and should well know at the times of buying, receiving and possessing said goods and chattels as aforesaid that the said goods and chattels had theretofore been stolen. [3]

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said Thomas E. Jones, Creed Lane, Edward Bourdell and Clarence H. Bellamy, and each of them on the 25th day of January, 1920, did knowingly, wilfully, unlawfully and feloniously, in the Northern Division of the Western District of Washington, ride upon and accompany that certain railroad train from Ellensburg to the town of Auburn, containing as a part thereof a certain railroad car known as and bearing initials and number C. P. & St. L. 4188, then and there operated on the railroad route and transportation system of the Northern Pacific Railway Company under Federal control.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said Thomas E. Jones and Creed Lane, on, to wit, the 31st day of July, 1919, did then and there ride upon and accompany from Ellensburg to the town of Auburn in the Northern Division of the Western District of Washington, that

said railroad train then and there including as a part thereof that certain railroad car known as and bearing initials and number N. P. 31800, upon and over the route and transportation system of Northern Pacific Railway Company then and there under Federal control.

That after the formation of said conspiracy, and in pursuance thereof, and in order to effect the object of said conspiracy, the said Thomas E. Jones, Edward Bourdell, Clarence H. Bellamy and Creed Lane did knowingly, willfully, unlawfully and feloniously ride upon and accompany from Auburn, in the Northern Division of the Western District of Washington, to Ellensburg, that certain train then and there including as a part thereof that certain car known as and bearing initials and number N. P. 96,333, then and there moving upon and along the route and transportation system of the Northern Pacific Railway Company, then and there under Federal control.

[4]

That after the formation of said conspiracy, and in pursuant thereof, and in order to effect the object thereof, the said Thomas E. Jones and Creed Lane on the 12th day of February, 1920, at Auburn, in the Northern Division of the Western District of Washington, did then and there knowingly, wilfully, unlawfully, and feloniously approach and examine that certain railroad car known as and bearing initials and number C. B. & Q. 38,573, which said car then and there was included and a part of a railway train being and about to be moved and operated over the railroad route and

transportation system of the Northern Pacific Railway Company, then and there under Federal control.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, the said Creed Lane on the 6th day of February, 1920, at Auburn, in the Northern Division of the Western District of Washington, did then and there knowingly, wilfully, unlawfully and feloniously enter that certain railroad car known as and bearing initials N. P. 96,333, then and there being included in and a part of that certain train then and there being moved and operated on the railroad route and transportation system of the Northern Pacific Railway Company, then and there under Federal control.

That after the formation of said conspiracy, and in pursuance thereof, and in order to effect the object thereof, said Thomas E. Jones on the 12th day of February, 1920, did knowingly, wilfully, unlawfully and feloniously ride upon and accompany from Ellensburg to Auburn, in the Northern Division of the Western District of Washington, that certain train including as a part thereof that certain car known as and bearing initials and number M. C. 61,880, then and there being moved and operated upon the railroad route and transportation system of the Northern Pacific Railway Company, then and there under Federal control. [5]

That after the formation of said conspiracy, and in pursuance thereof, and in order to effect the object thereof, the said Thomas E. Jones and the

said Joe Veagus at East Auburn, in the Northern Division of the Western District of Washington, on the 24th day of February, 1920, did then and there knowingly, wilfully, unlawfully and feloniously talk and converse together.

That after the formation of said conspiracy, and in pursuance thereof, and in order to effect the object thereof, the said Creed Lane, on the 17th day of February, 1920, at Auburn, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, did then and there knowingly, willfully, unlawfully and feloniously possess and conceal certain articles, goods, wares and merchandise theretofore feloniously stolen from certain railroad cars while moving as and constituting parts of interstate and foreign shipments of freight and express, to wit, six overcoats, hosiery, one shotgun, shirts, shoes, cotton goods, cotton gloves, electric caps, phonographs, records, cigarettes and other articles, a more particular description thereof being to the grand jurors unknown.

That after the formation of said conspiracy, and in pursuance thereof, and in order to effect the object thereof the said George E. White, on the 25th day of February, 1920, at Auburn, in the Northern Division of the Western District of Washington, did then and there knowingly, wilfully, unlawfully and feloniously possess and conceal certain articles, goods, wares, and merchandise theretofore feloniously stolen from a railroad car moving in interstate commerce and being and constituting a part of an interstate shipment of freight, to

wit, one certain man's overcoat, shoes, neckties, padlocks, three bottles of Jergin's lotion, benzoin, men's shirts, razor strops and other goods and chattels, a more particular description whereof is to the grand jurors unknown. [6]

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, the said Clarence H. Bellamy, on the 25th day of February, 1920, at Auburn, in the Northern Division of the Western District of Washington, did then and there knowingly, wilfully, unlawfully and feloniously possess and conceal certain goods, chattels, wares and merchandise theretofore feloniously stolen from a railroad car, railroad station-house, railroad platform and railroad depot, while moving as and constituting a part of an interstate shipment of freight and express, to wit, men's shoes, together with other articles, goods, merchandise, and chattels, a more particular description whereof is to the grand jurors unknown.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, the said Albert Bruce Paris, on the 25th day of February, 1920, at Auburn, in Northern Division of the Western District of Washington, did then and there knowingly, wilfully, unlawfully and feloniously have possess and conceal certain chattels, goods, wares and merchandise theretofore feloniously stolen from certain railroad cars, railroad station-houses, railroad platforms and railroad depots, while moving as and constituting a part of cer-

tain shipments of freight and interstate commerce, to wit, certain men's shoes, Educator brand, together with other personal clothing, shirts and merchandise, a more particular description whereof is to the grand jurors unknown.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, the said Thomas E. Jones, on the 25th day of February, 1920, at Auburn, in the Northern Division of the Western District of Washington, did then and there knowingly, wilfully, unlawfully, and feloniously possess and conceal certain goods, wares, merchandise and chattels theretofore feloniously stolen from certain railroad cars, railroad station-houses, railroad platforms and [7] railroad depots, while moving as and constituting a part of an interstate shipment of freight and express, to wit, canvas gloves, one hundred Mazda electric light bulbs, canned goods, whiskey bottles, bacon, grain in sacks and one sack of sugar, together with other goods, chattels, wares and merchandise, a more particular description whereof is to the grand jurors unknown.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, the said Edward Bourdell, on the 25th day of February, 1920, at Auburn, in the Northern Division of the Western District of Washington, did then and there knowingly, wilfully and unlawfully and feloniously have, possess and conceal certain goods, chattels, wares and merchandise theretofore feloniously stolen from certain railroad cars, railroad station-houses, railroad

platforms and railroad depots, while moving as and constituting a part of an interstate shipment of freight and express, to wit, certain razor strops, together with other goods, wares, merchandise and chattels, a more particular description whereof is to the grand jurors unknown.

That after the formation of said conspiracy, and in pursuance thereof, and in order to effect the object thereof, the said Sarah Jones, on the 25th day of February, 1920, at Auburn, within the Northern Division of the Western District of Washington, did then and there knowingly, wilfully, unlawfully and feloniously have, possess, and conceal certain goods, wares, merchandise and chattels, theretofore feloniously stolen from certain railroad cars, railroad station-houses, railroad platforms and railroad depots, while moving as and constituting a part of interstate shipments of freight and express, to wit, certain shoes and dress goods, together with other goods, wares, merchandise and chattels, a more particular description whereof is to the grand jurors unknown.

That after the formation of said conspiracy and *and* in pursuance thereof, and in order to effect the object thereof, the said Mrs. J. A. Lewis (whose true Christian name is to the grand jurors unknown), on the 29th day of March, 1920, at the St. Elmo Hotel, [8] at the city of Auburn, in the Northern Division of the Western District of Washington, at two o'clock A. M. arose and came down to the front door in her wrapper to answer an inquiry made of her then and there by one Will-

iam Ratcliff, when and where and under these circumstances the following conversation took place between the said Mrs. J. A. Lewis and the said William Ratcliffe; William Ratcliff said, "Mrs. Lewis, where is Fowler? Why didn't he meet us as agreed?" Mrs. Lewis replied, "He is up at Cemetery Hill getting those auto tires, and should be back any time." Mrs. Lewis then asked William Ratcliff, "Do you know the man you are dealing with over these tires?" Ratcliff replied, "I know him and know that he is all right." Mrs. Lewis said, "How do you know he is all right?" Ratcliff replied, "He was sent in to me by a friend who told me this man was O. K."

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, the said Mrs. J. A. Lewis (whose true Christian name is to the grand jurors unknown) on the 30th day of March, 1920, at the residence of Mrs. Maud Ratcliff, 111 South Maude Street, at the city of Auburn, in the Northern Division of the Western District of Washington, spoke concerning the trouble the boys were in over the auto tires and mentioned Lemuel S. Fowler, William Ratcliff and Herbert William Hansen and their trouble over the auto tires and the cases of shoes, and then said: "Had I looked out my front door when Mr. Ratcliff came to my hotel at two o'clock Sunday morning and asked for Fowler, and why he had not met them, and when I said that he had gone for the auto tires, had I seen the man that was in the automobile I could have told then and

there that the man was dangerous and that it was foolish for them to have any business transactions with him in any manner.”

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, the said Mrs. J. A. Lewis (whose true Christian name is to the grand jurors unknown), on the 2d day of April, 1920, at the St. Elmo Hotel, in the city of Auburn, in the Northern Division of the Western District of Washington, did then and there knowingly, wilfully, unlawfully and feloniously possess and conceal six (6) steak knives theretofore stolen and known to so have been stolen by the said Mrs. J. A. Lewis from a shipment contained in G. N. freight-car 211,470, consigned to Wells Butcher Supply Co., Seattle, State of Washington, from Russell Cutlery Co., Turner Falls, State of Massachusetts. [9]

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, the said Thomas E. Jones, and Edward Bourdell, being then and there members of the train crew handling and hauling freight-car G. N. 211,470 in train Extra West, arriving at Auburn, in the Northern Division of the Western District of Washington, on March 26, 1920, did then and there knowingly, wilfully, unlawfully and feloniously possess and conceal certain articles, goods, wares and merchandise theretofore feloniously stolen from that certain last above mentioned freight railroad car while moving as and constituting part of interstate shipments of freight and ex-

press, to wit, one suit, man's gray and brown mixed, constituting part of a shipment moving in interstate commerce from Baltimore, Maryland, to Seattle, Washington, and consigned to Lundquist-Lilly Co.; also divers and sundry cutlery theretofore stolen and known so to have been by said defendants Thomas E. Jones and Edward Bourdell and George H. Trepanier from a shipment contained in the aforesaid G. N. freight-car 211,470, consigned to Wells, Butcher Supply Co., Seattle, Washington, from Russell Cutlery Co., Turner Falls, Mass.; also four new adjustable auto wrenches theretofore stolen as aforesaid from said interstate shipment; also one new four-pane window-sash, boxed, from and out of said interstate shipment contained in said car; also one brown mixed goods Mackinaw; also various and sundry men's caps, hats, grain sacks and other haberdashery, merchandise and groceries so stolen as aforesaid from and out of said shipments; also boots and shoes theretofore stolen from said interstate shipments moving in interstate commerce on and upon said railroad; all of which said divers and sundry goods and wares and merchandise were each and severally found in the caboose [10] 1850 attached to said interstate trains, G. N. 211,470, then and there in charge of Conductor Thomas E. Jones, and Brakeman Edward Bourdell.

That after the formation of said conspiracy and in pursuance thereof and in order to effect the object thereof, the said Thomas Singer on the 26th day of March, 1920, at Seattle, in the Northern

Division of the Western District of Washington, did then and there knowingly, wilfully, unlawfully and feloniously receive, possess and conceal two suits of men's clothing from the defendant Edward Bourdell, theretofore feloniously stolen from a certain railroad car while moving as and constituting part of interstate and foreign shipments of freight and express, to wit, G. N. freight-car 211,470, carrying one case men's suits consigned to Lundquist-Lilly Co., Seattle, Washington, from L. Greiff & Bros., Baltimore, Maryland.

That after the formation of said conspiracy and in pursuance thereof and in order to effect the object thereof, the said Thomas Singer did on the 29th day of February, 1920, at Seattle, Washington, knowingly, wilfully, unlawfully and feloniously received and possess one man's overcoat from defendant Edward Bourdell, he the said Thomas Singer well knowing that the same had theretofore been stolen from goods moving in interstate commerce shipments, to wit, from and out of C. P. & St. L. freight-car 4188, containing a shipment of men's overcoats consigned from Hart, Schaffner & Marx to M. Prager & Co., Seattle, Washington.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object [11] thereof, the said Edward Bourdell did knowingly, wilfully, unlawfully and feloniously on March 1, 1920, go to, visit and see the said defendant Thomas Singer at his place of business at 304 Denny Building, Seattle, Washington.

That after the formation of said conspiracy, and

in pursuance thereof, and in order to effect the object thereof, the said Thomas Singer did on the first day of March, 1920, knowingly, wilfully, unlawfully and feloniously offer to buy and negotiate for certain goods, wares and merchandise from the said defendant Edward Bourdell, knowing the same to have lately theretofore been stolen from interstate commerce shipments.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, the said Clarence H. Bellamy, Thomas E. Jones, Herbert William Hanson, Elmuel S. Fowler and Edward Bourdell did on the 16th day of April, 1920, at Auburn, in the Northern Division of the Western District of Washington, then and there knowingly, wilfully, unlawfully and feloniously meet and confer together in a certain room in the Lloyd Hotel.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, the said Herbert William Hanson, William Ratcliff, and David Jones did knowingly, wilfully, unlawfully and feloniously on February 28, 1920, enter railroad freight-car P. F. E. 12,320, then and there moving in interstate commerce for the Northern Pacific Railway Company, in said Northern Division of the Western District of Washington, containing a shipment of interstate commerce of shoes consigned by Peters Shoe Co., St. Louis, Mo., to J. H. Taylor, Seattle, Washington, and knowingly, wilfully, unlawfully and feloniously remove from said car four cases of said

shoes, the whole of said shipment and destroy the way-bill under which the said shipment was moving, and hide and conceal said [12] shoes at a point at Mile Post 91, in King County, Washington, and about one hundred yards from the railroad right of way.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, Herbert William Hanson, William Ratcliff and David Jones on the 2d day of March, 1920, wilfully, knowingly, unlawfully and feloniously entered that certain railway freight-car, Penn car 43,493, and stole, took and carried away therefrom three rolls of grass matting, theretofore shipped from China in foreign commerce to St. Paul, Minnesota, over the Northern Pacific Railway.

That after the formatioin of said conspiracy and in pursuance thereof, and in order to effect the object thereof, William Ratcliff, did knowingly, wilfully, unlawfully and feloniously on the 4th day of March, 1920, possess and conceal in his house at Auburn, in the Northern Division of the Western District of Washington, two rolls grass matting, well knowing that the same had been theretofore feloniously stolen from a railroad car moving in foreign commerce.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, Herbert William Hanson, did knowingly, wilfully, unlawfully and feloniously on the 4th day of March, 1920, possess and conceal in his

house at Auburn, in the Northern Division of the Western District of Washington, one roll grass matting, well knowing that the same had been theretofore feloniously stolen from a railroad car moving in foreign commerce.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, William Ratcliff did then and there knowingly, wilfully, unlawfully and feloniously on the 14th day of September, 1919, possess and conceal a certain sack of sugar, to wit, fifty pounds of sugar, theretofore feloniously stolen from an interstate shipment of sugar travelling in interstate from San Francisco, California, [13] consigned to Powell-Sanders Co., Spokane, Washington, in Northern Pacific car 23,247, which said sugar said defendant William Ratcliff hauled in Northern Pacific R. R. train on September 14, 1919.

That after the formation of said conspiracy and in pursuance thereof and in order to effect the object thereof, Lemuel S. Fowler, William Ratcliff and James Francis Mellison, on the 28th day of March, 1920, at Renton, in King County, in the Northern Division of the Western District of Washington, did then and there knowingly, wilfully, unlawfully and feloniously offer to sell and dispose and negotiate for the sale and disposition of certain stolen property, to wit, certain automobile tires, lately stolen from Northern Pacific freight-car 101,059 while moving over the Northern Pacific Railroad from the city of Seattle, Washington, to the city of Portland, State of Oregon.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said Ethyl Hanson and Herbert William Hanson, and each of them, on the 28th day of March, 1920, at Auburn, in the Northern Division of the Western District of Washington, did then and there unlawfully, knowingly, wilfully and feloniously possess and conceal certain articles, goods, wares and merchandise theretofore feloniously stolen from a railroad car moving in interstate commerce and being and constituting a part of an interstate shipment of freight, to wit, certain automobile tires, a more particular description whereof is to the grand jurors unknown.

That after the formation of said conspiracy and in pursuance thereof and in order to effect the object of the same while said conspiracy remained in effect, at the city of Auburn, in King County, in the Northern Division of the Western District of Washington, and on March 28, 1920, the said Ethyl Hanson, Herbert William Hanson, William Ratcliff, Lemuel S. Fowler and James Francis Mel-lison; and each of them, did knowingly, wilfully, unlawfully and feloniously assemble together and in automobiles [14] proceed in a westerly direction to a point beyond what is known and called "Cemetery Hill," where they, and each and all of them, uncovered, discovered and removed a cache of goods, wares, and merchandise, to wit, automobile tires, theretofore stolen, removed, secreted, and hidden from the railway freight-cars in which they

were moving in interstate commerce, and placed said tires in said automobiles and transported them in said automobiles to a point east of Covington, Washington, where said defendants, and each of them, further uncovered, found and discovered certain goods, wares and merchandise, to wit, shoes previously stolen while being transported in interstate commerce, and then and there the said last above-named defendants, and each of them, proceeded to transport in said automobiles the afore-said stolen goods and property to the city of Auburn, Washington.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of the same, while said conspiracy was still in existence and effect, and on the 28th day of March, 1920, in King County, in the Northern Division of the Western District of Washington, the said Lemuel S. Fowler, William Ratcliff and James Francis Mellison, and each of them, did wilfully, knowingly, unlawfully and feloniously assemble together in the city of Renton, King County, at Edwards' garage.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of the same, while said conspiracy remained in effect, and on the 28th day of March, 1920, at Renton, in the Northern Division of the Western District of Washington, the said Lemuel S. Fowler, William Ratcliff and James Francis Mellison, and each of them, did knowingly, wilfully, unlawfully and feloniously negotiate for the sale of various

and sundry articles, to wit, said automobile tires and shoes to one E. Hughes. [15]

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, while the same was still in existence and effect, at Renton, in the Northern Division of the Western District of Washington, on March 28, 1920, the said Lemuel S. Fowler, William Ratcliff and James Francis Mellison, and each of them, did knowingly, wilfully, unlawfully and feloniously, agree to sell said goods, wares and merchandise theretofore feloniously stolen from interstate shipments, to wit, said automobile tires and said shoes, a more particular description of which is to the grand jurors unknown, to one E. Hughes, for the sum and price of fifteen dollars (\$15) for each of said automobile tires and three dollars (\$3) per pair for each and all of said pairs of shoes.

That after the formation of said conspiracy and in pursuance thereof and in order to effect the object thereof, and while said conspiracy was still in effect, at Edwards' Garage, in the city of Renton, King County, in the Northern Division of the Western District of Washington, on March 28, 1920, the said Lemuel S. Fowler did knowingly, wilfully, unlawfully, and feloniously attempt to pull an automatic 38-calibre revolver and shoot Deputy Sheriff S. Campbell.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, while said conspiracy was still in effect, the said William Ratcliff, James Francis

Mellison and Lemuel S. Fowler, and each of them, knowingly, wilfully, unlawfully and feloniously, unloaded and discharged from said automobiles in which they transported said automobile tires and cases of shoes, on the 28th day of March, 1920, at Edwards' Garage, in the city of Renton, King County, in the Northern Division of the Western District of Washington. [16]

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, while said conspiracy was still in effect, the said William Ratcliff, James Francis Mellison and Samuel Fowler, and each of them, knowingly, wilfully, unlawfully and feloniously, on the 28th day of March, 1920, assembled together in Edwards' Garage, in the city of Renton, in the Northern Division of the Western District of Washington, and then and there were armed with deadly weapons, each of them carrying a pistol.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of the same, while said conspiracy was still in effect, the said Lemuel S. Fowler at Auburn, in the Northern Division of the Western District of Washington, on March 25, 1920, knowingly, wilfully, unlawfully and feloniously, stated to one John Doe as follows: "Why do you want to know where Conductor Scott lives?" to which John Doe replied, "I heard he had some auto tires to sell." Whereupon Fowler replied, "I am the fellow."

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the

object of said conspiracy, Herbert W. Hanson did then and there wilfully, unlawfully and feloniously, on March 23, 1920, offer to sell and deliver to one John Doe Welch certain articles, goods, wares and merchandise, theretofore feloniously stolen from a railroad car moving in interstate commerce and being and constituting an interstate shipment of freight, to wit, certain automobile tires and cigarettes, and other goods and chattels, a more particular description thereof being to the grand jurors unknown.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said [17] conspiracy, the said Lemuel S. Fowler, on the 23d day of March, 1920, at the city of Auburn and vicinity, in the Northern Division of the Western District of Washington, did then and there wilfully, unlawfully and feloniously offer to sell and deliver certain articles, goods, wares and merchandise, theretofore feloniously stolen from a railroad car moving in interstate commerce and being and constituting a part of interstate shipment, to wit, certain automobile tires for the price of ten dollars (\$10) each, and certain cigarettes for the price of thirty-five dollars (\$35) per carton containing one thousand cigarettes in each carton, and other goods and chattels, a more particular description of which is to the grand jurors unknown.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said James Francis

Mellison, on the 23d day of March, 1920, at the city of Auburn and vicinity, in the Northern Division of the Western District of Washington, did then and there wilfully, unlawfully, knowingly and feloniously offer to sell and deliver certain articles, goods, wares and merchandise theretofore feloniously stolen from a railroad car moving in interstate commerce and being and constituting a part of interstate shipment, to wit, pig tin to a certain John Doe Welch.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said James Francis Mellison, on the 29th day of March, 1920, at the city of Seattle, in the Northern Division of the Western District of Washington, did then and there wilfully, unlawfully and feloniously offer to sell and deliver to Stewart Campbell in consideration of the said Stewart Campbell then and there releasing the said James Francis Mellison from arrest, certain articles, goods, wares and merchandise, theretofore feloniously stolen from a railroad [18] car moving in interstate commerce and being and constituting a part of interstate shipment, to wit, pig tin, a more particular description of which is to the grand jurors unknown.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of the same, the said Joe Veagus, on the 24th day of January, 1920, walked to and approached the caboose attached to the freight train just brought in under the supervision of Conductor Thomas E. Jones, and said to Thomas E. Jones,

“Did you bring any more of that stuff down this morning?” To which Thomas E. Jones replied, “No; look out, the bulls are coming,”—contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT II.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on, to wit, the 30th day of March, 1918, and continuously thereafter to the time of the presentment of this indictment, at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court Lemuel S. Fowler, George E. White, Clarence H. Bellamy, Albert Bruce Paris, Thomas E. Jones, Edward Bourdell, Sarah Jones, Joe Veagus, Herbert William Hanson, Ethyl Hanson, William Ratcliff, James Francis Mellison, Thomas Singer, David Jones and Creed Lane, George H. Trepanier and Mrs. J. A. Lewis, have unlawfully, corruptly and feloniously combined, conspired, confederated and agreed together, and one with the other, and together and with divers other persons to the grand jurors unknown, all of the said defendants hereinabove named and said other persons unknown being hereinafter called the conspirators, to commit an offense against the United States, to wit, to violate section 35 of the Penal Code of the United States, as amended by the Act of Congress approved October 23, 1918, it being then and there the plan, purpose and object [19] *it being then and there the*

plan, purpose and object of the said conspiracy and of the said conspirators that they, the said conspirators, and each of them, should and would knowingly, wilfully, unlawfully and feloniously take, steal and carry away for their own use of the said conspirators, and each of them, and for the own use of the said conspirators, and each of them, and for the use of other persons to the grand jurors unknown, with the unlawful and felonious intent then and there on the part of said conspirators, and each of them, to steal and purloin certain personal property of value of the United States; it being then and there the further plan, purpose and object of the said conspiracy and of the said conspirators, and each of them, that they, the said conspirators, and each of them, would and should take, steal and carry away the said goods, wares, merchandise and chattels as aforesaid, and with felonious intent as aforesaid, from certain railroad cars, railroad station-houses, railroad platforms, railroad depots and railroad yards and premises then and there in and under federal possession and control.

That after the formation of said conspiracy, and in pursuance thereof and in order to effect the object thereof, the said several defendants, at and on the several places and dates in Count I of this indictment more particularly mentioned and set forth, did then and there knowingly, wilfully, unlawfully and feloniously do and commit each and all of those certain acts referred to and set forth and charged as having been committed by said defendants in

Count I of this indictment at and on line 9, page 4, to and including line 4, page 17, of this indictment, to which reference is hereby made, the same incorporated in this count as if more fully set forth herein; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [20]

COUNT III.

And the grand jurors aforesaid, upon their oaths, aforesaid, do further present:

That on, to wit, the 30th day of March, 1918, and continuously thereafter to the time of the presentment of this indictment, at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, Lemuel S. Fowler, George E. White, Clarence H. Bellamy, Albert Bruce Paris, Thomas E. Jones, Edward Bourdell, Sarah Jones, Joe Veagus, Herbert William Hanson, Ethyl Hanson, William Ratcliff, James Francis Mellison, Thomas Singer, David Jones and Creed Lane, Geo. H. Trapanier and Mrs. J. A. Lewis, have knowingly, wilfully, unlawfully, corruptly and feloniously combined, conspired, confederated and agreed together, and one with the other, and together and with divers other persons to the grand jurors unknown, all of the said defendants herein above named, and said other persons unknown being hereinafter called the conspirators, to defraud the United States in the manner and by the means following, to wit, that they the said conspirators, and each of them should and would knowingly, wilfully, unlawfully and feloni-

ously take, steal, carry away, purloin, embezzle and convert to their own use certain goods, wares, merchandise, chattels and property then and there moving as and constituting a part of certain shipments of freight and express on and over certain railroad routes and systems of transportation *then there* under federal control, the said goods, wares, merchandise, chattels and property then and there being in the possession of the United States as a common carrier of goods for hire; and also certain tolls, equipment and property then and there used in the maintenance and operation of certain railroad routes and transportation systems then and there under federal [21] control.

That after the formation of said conspiracy and in pursuance thereof and in order to effect the object thereof, the said several defendants, at and on the several places and dates in Count I of this indictment more particularly mentioned and set forth, did then and there knowingly, wilfully, unlawfully and feloniously do and commit each and all of those certain acts referred to and set forth and charged as having been committed by said defendants in Count I of this indictment, at and on line 9, page 4, to and including line 4, page 17, of this indictment, to which reference is hereby made, and same incorporated in this count as if more fully set forth herein; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

ROBT. C. SAUNDERS,
United States Attorney.

[Endorsed]: Indictment for Vio. Sec. 37, C. C., to Vio. Act of Feb. 13, 1913. A True Bill. E. Shorroek, Foreman Grand Jury. Presented to the Court by the Foreman of the Grand Jury in Open Court, in the Presence of the Grand Jury, and Filed in the U. S. District Court, April 28, 1920. F. M. Harshberger, Clerk. [22]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEMUEL S. FOWLER, GEORGE E. WHITE,
SARAH JONES, WILLIAM HANSON,
ETHYL HANSON, JAMES FRANCIS
MELLISON, DAVID JONES, GEO. H.
TREPANIER and J. A. LEWIS.

Defendants.

Arraignment and Plea.

Now, on this 17th day of May, 1920, into open court come the said defendants, Lemuel S. Fowler, George E. White, Sarah Jones, William Hanson, James Francis Mellison, David Jones, Geo. H. Trepanier and J. A. Lewis, for arraignment, accompanied by their attorneys, John F. Dore and E. H. Chavelle, and all answer that their true names are as above. Whereupon the reading of the indict-

ment is waived and they here and now enter their plea of not guilty.

Journal 2, page 284. [23]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLARENCE H. BELLAMY, THOMAS SINGER,
and WILLIAM RATCLIFF,

Defendants.

Arraignment and Plea.

Now, on this 17th day of May, 1920, into open court come the said Defendants Clarence H. Bellamy, Thomas Singer and William Ratcliff, for arraignment, with defendant Bellamy accompanied by his attorney, Carroll B. Graves, Singer accompanied by his attorney Tucker, and Ratcliff accompanied by his attorney H. Morris, and all answer that their true names are as above. Whereupon the reading of the charges are waived and they here and now enter their plea of not guilty to the charges as objected against them in the charges filed here.

Journal 2, page 284. [24]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEMUEL S. FOWLER, GEORGE E. WHITE,
CLARENCE H. BELLAMY, ALBERT
BRUCE PARIS, THOMAS E. JONES, ED-
WARD BOURDELL, SARAH JONES,
JOE VEACUS, HERBERT WILLIAM
HANSON, ETHYL HANSON, WILLIAM
RATCLIFF, JAMES FRANCIS MELLI-
SON, THOMAS SINGER, DAVID JONES,
CREED LANE, GEORGE H. TREPA-
NIER and MRS. J. A. LEWIS,

Defendants.

Demurrer.

COME NOW the defendants, Lemuel S. Fowler, George E. White, James Francis Mellison, George H. Trepanier and Mrs. J. A. Lewis, and each of them, and appearing by their attorney, John F. Dore, demur to Count 1, Count 2 and Count 3, each of said counts separately, upon the following grounds:

I.

That the same do not state facts sufficient to constitute a cause of action.

II.

That said indictment does not conform to the statutes of the United States.

III.

That said indictment does not inform the defendants definitely and without ambiguity, and does not furnish sufficient facts, or any facts at all, to enable defendants to prepare their defense.

JOHN F. DORE,
Attorney for Lemuel S. Fowler, George E. White,
James Francis Mellison, George H. Trepanier
and Mrs. J. A. Lewis. [25]

Acceptance of service of within Demurrer acknowledged this 5th day of May, 1920.

ROBERT C. SAUNDERS,
Attorney for Plaintiff (E. D. Dutton).

[Endorsed]: Demurrer. Filed in the United States District Court, Western District of Washington, Northern Division. May 5, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [26]

United States of America, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LEMUEL S. FOWLER,
Defendant.

Demurrer to Indictment Overruled.

Now, on this 17th day of May, 1920, this cause comes on for hearing on demurrer to indictment by defendants H. W. Hanson, Ethyl Hanson and David Jones, Lemuel S. Fowler et al., whereupon the demurrer is argued by respective counsel, and is overruled by the Court and exceptions allowed. Same ruling is made to demurrer of Edw. H. Chavelle and exceptions allowed.

Journal 2, page 285. [27]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEMUEL S. FOWLER et al.,

Defendants.

Trial.

Now, on this 25th day of May, 1920, this cause comes on for trial with all defendants present in their own proper persons, defendant Joe Vargus appearing in custody of the United States marshal. All parties hereto announce they are ready to proceed to trial, whereupon the following jurors are examined and excused for cause: Howard A. Quinn, E. C. Lowry, W. J. Stenfoot, Albert P. Robinson,

Elden W. Pollock, Alfred E. Scheider, H. B. Pederson, D. W. Jenkins and Nels F. Selender. The following named jurors are examined and passed by both sides and then challenged by the Government, to wit: Neil Gillis, Geo. S. Shelton, Walter Cooper, V. L. Elson, Fred A. Reid, John Sponek and Saml. J. Gendron. The following jurors are passed by both sides and then challenged by defendant, to wit: Henry A. Schaub, James Hertzog, F. O. Ehrlick, Ruel A. Russell, Le Roy De Long, James B. Barton, C. E. Briggs, Armin G. Schroeder, Jacob F. Ranning, Willard O. Palmer and D. B. Spellman. Whereupon the following jurors are, after examination, passed and sworn as jurors in this cause, to wit, E. Egbert Rhodes, Mary Johnson, H. A. Eckas, Martin Tjerne, Ed. McGraf, Saml. H. Poynor, Hugh Dugan, Frank Lotzgesell, Warren L. Sisler, Carl Smedberg, O. Sellgren and Jos. Patrick. Before the trial jury was completed, the names of jurors in the jury-box serving as petit jurors being exhausted, the clerk was ordered to draw from the jury-box the names of 6 persons, residents of Seattle, whereupon the clerk drew the following names: Willard O. Palmer, Thos. W. Scott, Wm. S. Rott, Harold H. Stewart, D. W. Jenkins, and Geo. E. M. Pratt. Venire was issued and marshal return the names of Willard O. Palmer and D. W. Jenkins. Whereupon the jury still being incomplete, it is stipulated in open court that an open venire is to be issued for five persons, returnable forthwith, [28] and Government and defendants

each to have privileges of one additional peremptory challenge. The marshal returns names of D. B. Spellman, Nels F. Selender, Saml. J. Gendorn, H. A. Eckas and Ed. McGraf, whereupon the Government's counsel makes opening statement, and whereupon defendant Wm. Ratcliff at this time withdraws former plea heretofore entered and enters his plea of guilty to charges as objected against him in the indictment herein filed. Whereupon on motion of defendants' counsel, John F. Dore, all witnesses for both sides are excluded from the courtroom during the trial of this cause except one special agent for the Government. Wm. Ratcliff was examined and sworn as witness for Government and Exhibits 1, 2, 3, 4, 5, 6 and 7 were introduced. The hour of adjournment having arrived, the Court admonished the jury and the cause was continued until 10:00 A. M. to-morrow. Witness Ratcliff was on the stand when adjournment was taken.

EDWARD E. CUSHMAN,
Judge.

Journal 2, page 301. [29]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
LEMUEL S. FOWLER et al.,
Defendants.

Trial (Continued).

Now, on this 26th day of May, 1920, this cause comes on for trial with all parties present, likewise the jury. The roll-call was waived and the trial resumed. Wm. Ratcliff resumes the stand. The following witnesses for the Government were examined and sworn: Roger Ayers, E. J. Hughes, Stewart Campbell, M. L. Lovall, Geo. M. Payne, John Linquist, J. C. Connor, Irving Brown and Alfred Kessler. Recess was announced and at 1:30 P. M. court was again in session. The jury was all present and the roll-call was waived. And now the hour of adjournment having arrived and by consent of counsel, and the jury having been cautioned, it is ordered that this cause be adjourned until May 27, 1920, at 10:00 A. M.

Whereupon court stands adjourned until May 27, 1920, at 10:00 A. M.

EDWARD E. CUSHMAN,
Judge.

Journal 2, page 304. [30]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
LEMUEL FOWLER et al.,
Defendants.

Trial (Continued).

Now on this 27th day of May, 1920, the trial is resumed, *will* all parties present, likewise the jury. The roll-call is waived. Government witness Kessler resumes the stand and the following witnesses for the Government are examined and sworn: Mrs. Ratcliff, J. M. Clark, Mrs. E. B. Penny, I. B. Armstrong, E. R. Toby, David Doyle, Jake Olson, Sam Bell, Winquist, Payne and Toby are recalled, Mr. Faylor, J. E. Barkwell, M. Proger, Mr. Amon, Alberg Jost, John Rust, L. W. Prager, V. B. Bundy, Charles Clark, S. P. Connell, G. R. McLaughlin, Richard Lund, L. G. Gray, W. K. Crowther, E. R. Wiggins, F. W. Parsons, James J. McManus, F. C. Hofsetter, H. F. Fritzinger, C. C. Moore, Leo Parks and C. J. Callahan and 81 exhibits were introduced. And now the hour of adjournment having arrived and by consent of counsel and the jury having been cautioned, it is ordered that this cause be adjourned until Friday May 28, 1920, at 10:00 A. M.

Whereupon court stands adjourned until May 28, 1920, at 10:00 A. M.

EDWARD E. CUSHMAN,
Judge.

Journal 2, page 305. [31]

United States District Court of the Western
District of Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEMUEL FOWLER et al.,

Defendants.

Trial (Continued).

Now on this 28th day of May, 1920, this cause comes on for trial, and all parties are present, likewise the jury. The roll-call is waived. The following witnesses for the Government were examined, and sworn: J. Hardin, Martin Mehan, C. Clark recalled T. J. Cummings, August Krieger, J. H. Taylor, T. H. Gerkenmeyer, J. S. Hindman, Ernest Gerkenmeyer, J. L. Roberts, J. D. McCormick, Wm. A. Fitzpatrick, Harry Richardson, A. C. Dow, Morris Murphy, E. J. Ferrell, P. J. Knudson, M. Moehring, L. Gotzka, be recalled; A. L. Coontz, N. Warshal, C. J. Bush, J. R. Young, Roy Ayres and C. W. Scott recalled; John L. Marks, R. C. Fritz, R. A. Hatten, G. F. Spaukenberg, Young was recalled; W. C. Brock, Carl Kelly, Lovell was recalled; Roy Tibbits, M. E. Blair, S. J. Quinn, Al. Spong, Alex Mackintosh, J. W. Humphrey and Joe Leonard, and Bush, Young, and Crowther were recalled and 45 exhibits were introduced. And now the hour of adjournment having

arrived and by consent of counsel and the jury having been cautioned, it is ordered that this cause be adjourned until May 29, 1920. 10:00 A. M.

Whereupon court stands adjourned until May 29, 1920, 10:00 A. M.

EDWARD E. CUSHMAN,
Judge.

Journal 2, page 306. [32]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LEMUEL FOWLER et al.,
Defendants.

Trial (Continued).

Now, on this 29th day of May, 1920, this cause comes on for trial, with all parties present, likewise the jury. The roll-call is waived and the trial is resumed. The following Government's witnesses were recalled; P. J. Knudson, Toby Brown, Lovall and Winquist at which time the Government rests. A motion was made by counsel for defendant Joseph Vargus for a directed verdict. As this was not opposed by the Government same was granted and the defendant discharged from further custody. Motion and argument for a directed verdict, etc., to

be taken up Tuesday. And now the hour of adjournment having arrived and by consent of counsel and the jury having been cautioned, it is ordered that this cause be adjourned until Monday, May 31, 1920, 10:00 A. M.

Whereupon the court stands adjourned until May 31, 1920, 10:00 A. M.

EDWARD E. CUSHMAN,
Judge.

Journal 2, page 306. [33]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
LEMUEL FOWLER et al.,
Defendants.

Trial (Continued).

Now on this 1st day of June, 1920, this cause comes on for trial. All parties being present, likewise the jury, the trial was resumed. A motion was made by Government's counsel that witnesses Cummings and Winquist be recalled and further testify, whereupon the Government again rests, and whereupon the jury is, for the purpose of the court hearing certain motions of the several defendants, excused to the hour of 2 P. M. All defendants join

but understand that motion is separately made that Government be compelled to elect which group of conspirators plaintiff will rely upon. This motion was denied and exceptions allowed. The counsel for C. H. Bellamy moves for a directed verdict. This motion was denied and exception allowed. The counsel for A. B. Paris moves for a directed verdict. This motion was granted. The counsel for Sarah Jones moves for a directed verdict which was denied and exceptions allowed. Counsel for Ethel Hanson moves for a directed verdict. Same was denied at this time. Counsel for David Jones moves for a directed verdict which was also denied and exception allowed. Counsel for defendant Louis Trepanier moves for a directed verdict. This motion is granted. Counsel for defendants Mrs. J. A. Lewis, Geo. E. White and Millison and Lemuel Fowler moves for a directed verdict which was denied and exception allowed. Counsel for defendant Singer moves for a directed verdict which is denied and exception allowed. The counsel for defendant Lane moves to strike all evidence relating to certain exhibits. [34] This motion was denied and exception allowed. At 2 P. M. the trial was resumed. The jury was all present and the roll-call was waived. The opening statement was made by Counsel Bostwick & Steel for defendant Mrs. Sarah Jones. The following witnesses were examined and sworn for defendant: Sarah Jones; Mrs. Sarah Jones, T. Jones, Emma K. Jones, S. Cavanaugh, W. R. Wiley, Mrs. A. Moss, John X. Mills, at which time defendant Sarah Jones rests. Open-

ing statement was made by counsel for defendant David Jones, Herbert William and Ethyl Hanson and the following witnesses were examined and sworn for Defendants Jones and Hanson; David Jones, James Losby, Henry Goldman and R. A. Hutchinson. And now the hour of adjournment having arrived and by consent of the counsel and the jury having been cautioned, it is ordered that this cause be adjourned until June 2, 1920, at 10 A. M.

Whereupon court stands adjourned until June 2, 1920, at 10 A. M.

EDWARD E. CUSHMAN,
Judge.

Journal 2, page 313. [35]

United States of America, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LEMUEL FOWLER et al,
Defendants.

Trial (Continued).

Now on this 2d day of June, 1920, this cause comes on for trial. All parties are present, likewise the jury. The roll-call is waived and the trial is resumed. The following witnesses for the defendants

were examined and sworn: Stanley W. Brown, J. R. Wallace, Herbert Wm. Hanson, S. M. Griffin, Henry Lang, J. M. Windley, Geo. W. Colby, E. H. Farler, Wm. S. Dipps, Saml. L. Ackerman and Ethyl Hanson, and D. Jones, W. R. Wiley and S. Cavanaugh recalled, at which time defendants David Jones, Herbert and Ethyl Hanson rest. A recess was announced from 12 noon to 1:30 P. M. At 1:30 P. M. the jury returned and all present and roll-call waived, the trial is resumed. The opening statement for defendant Thomas Singer was made by Wilmon Tucker. Witnesses Thomas S. Singer and Edith Hill witnesses for defendant Singer, were temporarily withdrawn to finish testimony later. Singer is recalled and further testifies. Witness Singer again was withdrawn and counsel for S. E. Jones, Lane & Bourdell was allowed to call character witnesses as follows, to wit: Irving B. Nickerbocker, Walter W. Downing, James B. McGilvrey, Geo. Krouse, B. F. Hoye, W. J. Baine and James M. Reilley and Wm. S. Dippo. And now it is ordered that this cause be adjourned until 10:00 A. M. to-morrow.

Journal 2, page 315.

EDWARD E. CUSHMAN,

Judge. [36]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEMUEL FOWLER et al.,

Defendants.

Trial (Continued).

Now, on this 3d day of June, 1920, this cause comes on for trial. All parties are present, likewise the jury. The roll-call is waived and the trial is resumed. Edward Bourdell at this time withdraws his former plea of not guilty heretofore entered and enters a plea of guilty to Counts I, II, and III of the indictment filed herein. The Government moves that the sentence be passed for the present and same is granted. The following witnesses for defendant Singer are examined and sworn: E. M. Bird, Adolph Behrends, Alexander Malamud, Geo. C. Ricord and Hazel Downing and Thos. Singer is recalled, at which time defendant Singer rests. The following witnesses for defendants Thos. E. Jones and Creed Lane are examined and sworn: H. C. McIntyre, James Harry Price, Creed Lane, Mrs. Creed Lane, Wm. O. Adams, Mrs. T. E. Jones, Thos. E. Jones and W. W. Goodson and J. R. Wallace and S. M. Griffn are recalled. Defendants T. E. Jones and Creed Lane rest. The opening statement is made by counsel for defendants

Fowler, White, Mellison and Lewis, and witnesses Mrs. Sarah Lewis and J. W. Brown are examined and sworn. And now the hour of adjournment having arrived and by consent of counsel and the jury having been cautioned, it is ordered that this cause be adjourned until to-morrow at 10:00 A. M.

Journal 2, page 316.

EDWARD E. CUSHMAN,
Judge. [37]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LEMUEL S. FOWLER et al.,
Defendants.

Trial (Continued).

Now, on this 4th day of June, 1920, this cause comes on for trial with all parties present, likewise the jury. The roll-call is waived and the trial is resumed. The following witnesses were examined and sworn for defendants: T. E. Jones and Creed Lane, B. Clarey, M. W. Lawrence, R. Rice, Frank Heirister, Geo. E. White, Lemuel S. Fowler, James F. Mellison, Dr. Frank Brook, Mrs. James Mellison, C. E. Allerdile, J. E. Price and A. C. Hubbard, at which time defendants T. E. Jones and Creed Lane rest. Defendant Bellamy without submitting evi-

dence in defense rests, likewise the Government. Whereupon counsel for defendant Thomas Singer moves the Court for a directed verdict of not guilty on Counts I, II and III of the indictment filed herein. This motion was denied and exception allowed on each count. Counsel for defendant Clarence H. Belamy moves for directed verdict of not guilty on Count I and same motion made on Count II and Count III of the indictment filed herein, but all motions were denied and exceptions allowed on each motion. Counsel for defendant Sarah E. Jones makes three motions for directed verdict of not guilty on Counts I, II and III and motions were denied and exceptions allowed on all three motions. Counsel for defendant Ethyl Hanson moves for directed verdict of not guilty on Counts I, II and III and motions were denied and exceptions allowed on all three motions. Counsel for defendants David Jones and Wm. Hanson makes three motions for a directed verdict of not guilty on Counts I, II and III of the indictment filed herein, but all three motions were denied and exceptions allowed. Counsel for defendants Geo. E. White, Lemuel S. Fowler, James Francis Mellison and Mrs. Sarah Jones makes three [38] motions for a directed verdict of not guilty on Counts I, II and III of the indictment filed herein, but all three motions were denied and exceptions allowed. Counsel for defendants Thos. E. Jones and Creed Lane make three motions for directed verdict of not guilty on Counts I, II and III of the indictment filed herein, but all motions were denied and exceptions allowed on each motion. Counsel for de-

fendant Thos. E. Jones moves to strike certain parts of the indictment, which was granted, the jury to be so instructed. The opening argument for the Government was made by Fred'k R. Conway. Recess from 5 P. M. to 7:30 P. M. was announced. Jury returned and all were present, also all defendants and attorneys for all parties present. Argument for Government was resumed by F. R. Conway. Argument to jury by F. A. Steel counsel for Sarah E. Jones, then an argument followed to jury by Carroll B. Graves, counsel for defendant Clarence H. Bellamy. Argument to jury by Wilmon Tucker, counsel for defendant Thomas Singer, and then an argument followed to jury by M. J. Gordon counsel for defendants Jones and Lane. And now the hour of adjournment having arrived and by counsel's consent, and the jury having been cautioned, it is ordered that this cause be adjourned until June 5, 1920, at 9:30 A. M.

Journal 2, page 321.

EDWARD E. CUSHMAN,

Judge. [39]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEMUEL FOWLER,

Defendant.

Trial (Continued).

Now, on this 5th day of June, 1920, this cause is resumed for trial with all parties present, likewise the jury. The roll-call was waived. Argument was made by counsel for defendants T. E. Jones and Creed Lane. Argument was made by E. H. Chavelle, counsel for defendants, David Jones, Herbert Wm. Hanson and Ethyl Hanson. Argument was made by J. F. Dore, counsel for defendants, Lemuel Fowler, White, Mellison, and Sarah Lewis. At 12:30 P. M. recess was announced until 2 P. M., at which time court again came in session, with the jury present and the roll-call was waived and the closing of the argument was made by Robert C. Saunders, counsel for the Government. The Court duly instructed the jury and it was agreed in open court that verdict if reached may be sealed and returned into court 10:00 A. M., Monday.

Journal 2, page 322.

EDWARD E. CUSHMAN,
Judge. [40]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEMUEL FOWLER et al.,

Defendants.

Trial (Continued).

Now, on this 7th day of June, 1920, this cause is resumed for trial, with all parties present and all jurors in the box. The roll-call is waived. The jury return a sealed verdict, which reads as follows: "We, the jury in the above-entitled cause, find the defendant Lemuel S. Fowler is guilty as charged in Count I of the indictment herein; and further find the defendant George E. White not guilty as charged in Count I of the indictment herein; and further find the defendant James Francis Millison not guilty as charged in Count I of the indictment herein; and further find the defendant Louis Trepanier not guilty as charged in Count I of the indictment herein; and further find the defendant Sarah Lewis not guilty as charged in Count I of the indictment herein; and further find the defendant Joe Vargus not guilty as charged in Count I of the indictment herein; and further find the defendant Thomas E. Jones not guilty as charged in Count I of the indictment herein; and further find the defendant Creed Lane is guilty as charged in Count I of the indictment herein; and further find the defendant David Jones not guilty as charged in Count I of the indictment herein; and further find the defendant Herbert Wm. Hanson is guilty as charged in Count I of the indictment herein; and further find the defendant Ethyl Hanson not guilty as charged in Count I of the Indictment herein; and further find the defendant Clarence H. Bellamy not guilty as charged in Count I of the Indictment herein; and further find the de-

fendant Arthur Pruce Paris not guilty as charged in Count I of the indictment herein; and further find the defendant Sarah Jones not guilty as charged in Count I of the indictment herein; and further [41] find the defendant Thomas Singer is guilty as charged in Count I of the indictment herein, and further find the defendant Lemuel S. Fowler is guilty as charged in Count II of the indictment herein; and further find the defendant George E. White not guilty as charged in Count II of the indictment herein; and further find the defendant James Francis Millison not guilty as charged in Count II of the indictment herein; and further find the defendant Louis Trepanier not guilty as charged in Count II of the indictment herein; and further find the defendant Sarah Lewis not guilty as charged in Count II of the indictment herein; and further find the defendant Joe Vargus not guilty as charged in Count II of the indictment herein; and further find the defendant Thomas E. Jones not guilty as charged in Count II of the indictment herein; and further find the defendant Creed Lane is guilty as charged in Count II of the indictment herein; and further find the defendant David Jones not guilty as charged in Count II of the indictment herein; and further find the defendant David Jones not guilty as charged in Count II of the indictment herein; and further find the defendant Herbert Wm. Hanson is guilty as charged in Count II of the indictment herein; and further find the defendant Ethyl Hanson not guilty as charged in Count II of the indictment herein; and further find the defendant Clarence H. Bellamy not

guilty as charged in Count II of the indictment herein; and further find the defendant Arthur Bruce Paris not guilty as charged in Count II of the indictment herein; and further find the defendant Sarah Jones not guilty as charged in Count II of the indictment herein; and further find the defendant Thomas Singer is guilty as charged in Count II of the indictment herein; and further find the defendant Lemuel S. Fowler is guilty as charged in Count III of the indictment herein; and further find the defendant George E. White not guilty as charged in Count III of the indictment herein; and [42] further find the defendant James Francis Millison not guilty as charged in Count III of the indictment herein; and further find the defendant Louis Trepanier not guilty as charged in Count III of the indictment herein; and further find the defendant Sarah Lewis not guilty as charged in Count III of the indictment herein; and further find the defendant Joe Vargus not guilty as charged in Count III of the indictment herein; and further find the defendant Thomas E. Jones not guilty, *not guilty* as charged in Count III of the indictment herein; and further find the defendant Creed Lane is guilty as charged in Count III of the indictment herein; and further find the defendant David Jones not guilty as charged in Count III of the indictment herein; and further find the defendant Wm. Hanson is guilty as charged in Count III of the indictment herein; and further find the defendant Ethyl Hanson not guilty as charged in Count III of the indictment herein; and further find the defendant Clarence H. Bellamy not guilty as charged

in Count III of the indictment herein; and further find the defendant Arthur Bruce Paris not guilty as charged in Count III of the indictment herein; and further find the defendant Sarah Jones not guilty as charged in Count III of the indictment herein, and further find the defendant Thomas Singer is guilty as charged in Count III of the indictment herein. Signed E. E. Rhodes, Foreman." The said verdict is published and received and filed as findings. Defendants Lemuel S. Fowler, Creed Lane, Herbert William Hanson and Thomas Singer each found guilty on Counts I, II and III. Defendants Geo. E. White, James Francis Millison, Louis Trepanier, Mrs. Sarah Lewis, Joe Vargus, Thomas E. Jones, David Jones, Ethyl Hanson, Clarence H. Bellamy, Arthur Bruce Paris and Sarah Jones found not guilty. The jury was discharged from further consideration herein. On oral stipulation of counsel for Government and counsel for all and each of the defendants, it is agreed that all merchandise exhibits introduced by the Government may now be returned to representative of [43] the Northern Pacific Railroad. This was so ordered and it was also agreed upon that the counsel for defendant Lewis may withdraw Defendant's Exhibit "B," "C" and "I," being one dozen steak knives and carving knife and fork. This was so ordered.

Journal 2, page 324.

EDWARD E. CUSHMAN,

Judge. [44]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEMUEL S. FOWLER, GEORGE E. WHITE,
JAMES FRANCIS MILLISON, LOUIS
TREPANIER, MRS. SARAH LEWIS, JOE
VARGUS, THOMAS E. JONES, ED-
WARD BOURDELL, CREED LANE, DA-
VID HONES, HERBERT WM. HANSON,
ETHYL HANSON, CLARENCE H. *BEL-*
IMAY, ARTHUR BRUCE PARIS, SARAH
JONES, WILLIAM RATCLIFF AND
THOMAS SINGER,

Defendants.

Verdict.

We, the jury in the above-entitled cause find the defendant Lemuel S. Fowler is guilty as charged in Count I of the indictment herein; and further find the defendant George E. White not guilty as charged in Count I of the indictment herein; and further find the defendant James Francis Millison not guilty as charged in Count I of the indictment herein; and further find the defendant Louis Trepanier not guilty as charged in Count I of the indictment herein; and further find the defendant Sarah Lewis not guilty as charged in Count I of the indictment herein;

and further find the defendant Joe Vargus not guilty as charged in Count I of the indictment herein; and further find the defendant Thomas E. Jones not guilty as charged in Count I of the indictment herein; and further find the defendant Creed Lane is guilty as charged in Count I of the indictment herein; and further find the defendant David Jones not guilty as charged in Count I of the indictment herein; and further find the defendant Herbert Wm. Hanson is guilty as charged in Count I of the indictment herein; and further find the defendant Ethyl Hanson not guilty as charged in Count I of the indictment herein; and further find the defendant Clarence H. Belamy not guilty as charged in Count I of the indictment herein; and further find the defendant Arthur Bruce Paris [45] not guilty as charged in Count I of the indictment herein; and further find the defendant Sarah Jones not guilty as charged in Count I of the indictment herein; and further find the defendant Thomas Singer is guilty as charged in Count I of the indictment herein; and further find the defendant Lemuel S. Fowler is guilty as charged in Count II of the indictment herein; and further find the defendant George E. White not guilty as charged in Count II of the indictment herein; and further find the defendant James Francis Millison not guilty as charged in Count II of the indictment herein; and further find the defendant Louis Trepanier not guilty as charged in Count II of the indictment herein; and further find the defendant Sarah Lewis not guilty as charged in Count II of the indictment herein; and further

find the defendant Joe Vargus not guilty as charged in Count II of the indictment herein; and further find the defendant Thomas E. Jones not guilty as charged in Count II of the indictment herein; and further find the defendant Creed Lane is guilty as charged in Count II of the indictment herein; and further find the defendant David Jones not guilty as charged in Count II of the indictment herein; and further find the defendant Herbert Wm. Hanson is guilty as charged in Count II of the indictment herein; and further find the defendant Ethyl Hanson not guilty as charged in Count II of the indictment herein; and further find the defendant Clarence H. Bellamy not guilty as charged in Count II of the indictment herein; and further find the defendant Arthur Bruce Paris not guilty as charged in Count II of the indictment herein; and further find the defendant Sarah Jones not guilty as charged in Count II of the indictment herein; and further find the defendant Thomas Singer is guilty as charged in Count II of the indictment herein; and further find the defendant Lemuel S. Fowler is guilty as charged in Count III of the indictment herein; and further find the defendant George E. White not guilty as charged in Count III of the indictment herein; and further find the defendant James Francis [46] Millison not guilty as charged in Count III of the indictment herein; and further find the defendant Louis Trepainier not guilty as charged in Count III of the indictment herein; and further find the defendant Sarah Lewis not guilty as charged in Count III of the indictment herein; and further

find the defendant Joe Vargus not guilty as charged in Count III of the indictment herein; and further find the defendant Thomas E. Jones not guilty as charged in Count III of the indictment herein; and further find the defendant Creed Lane is guilty as charged in Count III of the indictment herein; and further find the defendant David Jones not guilty as charged in Count III of the indictment herein; and further find the defendant Herbert Wm. Hanson is guilty as charged in Count III of the indictment herein; and further find the defendant Ethyl Hanson not guilty as charged in Count III of the indictment herein; and further find the defendant Clarence H. Bellamy not guilty as charged in count III of the indictment herein; and further find the defendant Arthur Bruce Paris not guilty as charged in Count III of the indictment herein; and further find the defendant Sarah Jones not guilty as charged in Count III of the indictment herein; and further find the defendant Thomas Singer is guilty as charged in Count III of the indictment herein.

E. E. RHODES,
Foreman.

[Endorsed]: Verdict. Filed in the United States District Court, Western District of Washington, Northern Division, June 7, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [47]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEMUEL S. FOWLER, GEORGE E. WHITE,
CLARENCE H. BELLAMY, ALBERT
BRUCE PARIS, THOMAS E. JONES,
EDWARD BOURDELL, SARAH JONES,
JOE VEAGUS, HERBERT WILLIAM
HANSON, ETHYL HANSON, WILLIAM
RATCLIFF, JAMES FRANCIS MELLI-
SON, THOMAS SINGER, DAVID JONES,
CREED LANE, GEORGE H. TREPANIER
and Mrs. A. J. LEWIS,

Defendants.

Motion for New Trial (Thomas Singer).

COMES NOW THOMAS SINGER, one of the
defendants in the above-entitled cause, by John F.
Dore, his attorney, and moves the Court to set aside
the verdict of the jury rendered herein, and to grant
a new trial, and for reasons therefor, shows to the
Court the following:

A. The Court erred in overruling defendant's
demurrer to Count I, Count II and Count III of the
indictment.

B. The verdict is contrary to the law of the case.

C. The verdict is not supported by any evidence
in the case.

D. The Court upon the trial of the case, admitted incompetent evidence offered by the United States.

E. The Court upon the trial of the case excluded competent evidence offered by the defendant.

F. The Court erred in refusing to direct a verdict of not guilty at the close of the Government's evidence.

G. The Court erred in refusing to direct a verdict of not guilty at the close of all the evidence.

Dated this 21st day of June, 1920.

JOHN F. DORE,

Attorney for Defendant, Thomas Singer. [48]

Acceptance of service of within Motion for New Trial acknowledged this 21st day of June, 1920.

ROBERT C. SAUNDERS,

Attorney for Plaintiff.

[Endorsed]: Motion for New Trial. Filed in the United States District Court, Western District of Washington, Northern Division. June 21, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [49]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEMUEL S. FOWLER, GEORGE E. WHITE,
CLARENCE H. BELLAMY, ALBERT
BRUCE PARIS, THOMAS E. JONES,
EDWARD BOURDELL, SARAH JONES,
JOE VEAGUS, HERBERT WILLIAM
HANSON, ETHYL HANSON, JAMES
FRANCIS MELLISON, THOMAS SINGER,
DAVID JONES, WILLIAM RATCLIFF,
CREED LANE, GEORGE H. TREPANIER
and MRS J. A. LEWIS,

Defendants.

Motion for New Trial (Lemuel S. Fowler). . . .

COMES NOW LEMUEL S. FOWLER, one of the
defendants in the above-entitled cause, by John F.
Dore, his attorney, and moves the Court to set aside
the verdict of the jury rendered herein, and to grant
a new trial, and for reasons therefor, shows to the
Court the following:

A. The Court erred in overruling defendant's
demurrer to Count I, Count II and Count III of the
indictment.

B. The verdict is contrary to the law of the case.

C. The verdict is not supported by any evidence
in the case.

D. The Court upon the trial of the case admitted incompetent evidence offered by the United States.

E. The Court upon the trial of the case excluded competent evidence offered by the defendant.

F. The Court erred in refusing to direct a verdict of not guilty at the close of the Government's evidence.

G. The Court erred in refusing to direct a verdict of not guilty at the close of all the evidence.

Dated this 21st day of June, 1920.

JOHN F. DORE,
Attorney for Defendant Lemuel S. Fowler. [50]

Acceptance of service of within Motion for New Trial acknowledged this 21st day of June, 1920.

ROBT. C. SAUNDERS,
Atty. for Plaintiff.

[Endorsed]: Motion for New Trial. Filed in the United States District Court, Western District of Washington, Northern Division. June 21, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [51]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LEMUEL S. FOWLER et al.,
Defendants.

Motion in Arrest of Judgment and for New Trial.

Now, on this 21st day of June, 1920, this cause comes on for hearing on motion of defendants Lemuel S. Fowler and Thomas Singer in arrest of judgment and motion for new trial. These motions were argued by respective counsel and both motions denied and exceptions allowed.

Journal 8, page 359. [52]

No. 5249.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEMUEL S. FOWLER et al.,

Defendants.

Sentence (Lemuel S. Fowler).

Now, on this 21st day of June, 1920, the defendant Lemuel S. Fowler comes into open court for sentence and being informed by the Court of the indictment returned against him in this cause and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, he nothing says as before he hath said, wherefore, by reason of the law and the premises, it is **CONSIDERED, ORDERED** and **ADJUDGED** that the defendant is guilty of violation of section 37, Criminal Code, to violate Act of February 13, 1913, and that he be sentenced to be

confined in the United States Penitentiary at McNeil Island, Washington, or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States for a period of eighteen months at hard labor from and after this date on each count of the indictment, terms to run concurrently, and to pay a fine of \$500.00 on each of Counts I, II and III of the indictment herein, and that he be further imprisoned at said prison until he shall have paid said fines or until he shall be discharged by law, and defendant is now remanded into the custody of the U. S. Marshal to carry this sentence into execution.

Judgment & Decree Book, page 508, vol. 2. [53]

No. 5249.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEMUEL S. FOWLER, THOMAS SINGER et al.,

Defendants.

Sentence (Thomas Singer).

Now, on this 21st day of June, 1920, comes the defendant Thomas Singer into open court for sentence and being informed by the Court of the indictment returned against him in this cause and of his conviction of record herein, he is asked whether he has any legal or just cause to show why sentence should not be passed and judgment had

against him, he nothing says save as before he hath said. Wherefore, by reason of the law and the premises, it is CONSIDERED and ADJUDGED that the defendant is guilty of violation of section 37, Criminal Code, to violate Act of February 13, 1913, and that he be sentenced to be imprisoned in the United States Penitentiary at McNeil Island, Washington, or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States for a period of one year and one day at hard labor from and after this date on each count of the indictment herein, terms to run concurrently, and to pay a fine of \$500.00 on each of Counts I, II and III, and that he be further imprisoned at the same place until he shall have paid said fines or until he is otherwise discharged by law, and defendant is now remanded into the custody of the United States Marshal to carry said sentence into execution.

Judgment and Decree Book, page 508, vol. 2. [54]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEMUEL S. FOWLER, GEORGE E. WHITE,
CLARENCE H. BELLAMY, ALBERT
BRUCE PARIS, THOMAS E. JONES,

EDWARD BOURDELL, SARAH JONES,
JOE VEAGUS, HERBERT WILLIAM
HANSON, ETHYL HANSON, WILLIAM
RATCLIFF, JAMES FRANCIS MELLI-
SON, THOMAS SINGER, DAVID JONES,
CREED LANE, GEORGE H. TREPA-
NIER and MRS. J. A. LEWIS,

Defendants.

Petition for Writ of Error (Lemuel S. Fowler).

In the Above-entitled Court, and to the Honorable
EDWARD E. CUSHMAN, Judge Thereof:

COMES NOW the above-named defendant Lemuel S. Fowler, and by his attorney and counsel respectfully shows that on June 7th, 1920, a jury empanelled in the above-entitled court and cause, returned a verdict finding said Lemuel S. Fowler guilty of the indictment theretofore filed in the above-entitled court and cause, and thereafter, within the time limited by law, under rules and order of this Court, defendant moved for a new trial, which motion was by the Court overruled and exception thereto allowed, and likewise, within said time, filed his motion for arrest of judgment, and which was by the Court overruled, and to which an exception was allowed; and thereafter, on the 21st day of June, 1920, this defendant was, by order and judgment and sentence of the above-entitled court in said cause, sentenced to pay a fine of \$—— and to serve a term of ——.

And your petitioner, feeling himself aggrieved by this verdict, and the judgment and sentence of

the Court, entered herein aforesaid, and by the orders and rulings of said Court, and proceedings in said cause, now herewith petition this Court for an order allowing them to prosecute a writ of error from said [55] judgment and sentence to the Circuit Court of Appeals of the United States for the Ninth Circuit, under the laws of the United States, and in accordance with the procedure of said court made and provided, to the end that said proceedings as herein recited, and as more fully set forth in the assignments of error presented herein, may be reviewed and manifest error appearing upon the face of the record of said proceedings, and upon the trial of said cause, may be by said Circuit Court of Appeals corrected, and that for said purpose, a writ of error and citation thereon should issue as by law and ruling of the Court provided, and wherefore, premises considered, your petitioner prays that a writ of error issue to the and that said proceedings of the District Court of the United States of the Western District of Washington may be reviewed and corrected, said errors in said record being herewith assigned, and presented herewith, and that pending the final determination of said writ of error by said Appellate Court, an order may be entered herein that all further proceedings be suspended and stayed, and that pending such final determination said defendant be admitted to bail.

JOHN F. DORE,
Attorney for Lemuel S. Fowler,
Plaintiff in Error.

[Endorsed]: Petition for Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. June 21, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [56]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

LEMUEL S. FOWLER, GEORGE E. WHITE,
CLARENCE H. BELLAMY, ALBERT
BRUCE PARIS, THOMAS E. JONES,
EDWARD BOURDELL, SARAH JONES,
JOE VEAGUS, HERBERT WILLIAM
HANSON, ETHYL HANSON, WILLIAM
RATCLIFF, JAMES FRANCIS MELLI-
SON, THOMAS SINGER, DAVID JONES,
CREED LANE, GEORGE H. TREPA-
NIER and MRS. J. A. LEWIS,
Defendants.

Petition for Writ of Error (Thomas Singer).

In the Above-entitled Court, and to the Honorable
EDWARD E. CUSHMAN, Judge Thereof:

COMES NOW the above-named defendant
Thomas Singer, and by his attorney and counsel,
respectfully shows that on June 7th, 1920, a jury
empanelled in the above-entitled court and cause,

returned a verdict finding Thomas Singer guilty of the indictment theretofore filed in the above-entitled court and cause, and thereafter, within the time limited by law, under rules and order of this Court, defendant moved for a new trial, which motion was by the Court overruled and exception thereto allowed, and likewise, within said time, filed his motion for arrest of judgment, and which was by the Court overruled, and to which an exception was allowed; and thereafter, on the 21st day of June, 1920, this defendant was, by order and judgment and sentence of the above-entitled court in said cause, sentenced to pay a fine of \$——— and to serve a term of ——.

And your petitioner, feeling himself aggrieved by this verdict, and the judgment and sentence of the Court, entered herein aforesaid, and by the orders and rulings of said Court, and proceedings in said cause, now herewith petition this Court for an order allowing them to prosecute a writ of error from said [57] judgment and sentence to the Circuit Court of Appeals of the United States for the Ninth Circuit, under the laws of the United States, and in accordance with the procedure of said court made and provided, to the end that said proceedings as herein recited, and as more fully set forth in the assignments of error presented herein, may be reviewed and manifest error appearing upon the face of the record of said proceedings, and upon the trial of said cause, may be by said Circuit Court of Appeals corrected, and for that purpose, a writ of error thereon should issue as by

law and ruling of the Court provided, and wherefore, premises considered, your petitioner prays that a writ of error issue to the end that said proceedings of the District Court of the United States of the Western District of Washington may be reviewed and corrected, said errors in said record being herewith assigned, and presented herewith, and that pending the final determination of said writ of error by said Appellate Court, an order may be entered herein that all further proceedings be suspended and stayed, and that pending such final determination, said defendant be admitted to bail.

JOHN F. DORE,
Attorney for Thomas Singer,
Plaintiff in Error.

[Endorsed]: Petition for Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. June 21, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [58]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LEMUEL S. FOWLER, GEORGE E. WHITE,
CLARENCE H. BELLAMY, ALBERT
BRUCE PARIS, THOMAS E. JONES,

EDWARD BOURDELL, SARAH JONES,
JOE VEAGUS, HERBERT WILLIAM
HANSON, ETHYL HANSON, WILLIAM
RATCLIFF, JAMES FRANCIS MELLI-
SON, THOMAS SINGER, DAVID JONES,
CREED LANE, GEORGE H. TREPA-
NIER and MRS. A. J. LEWIS,

Defendants.

Assignments of Error.

COME NOW the above-named defendants Lemuel S. Fowler and Thomas Singer, and in connection with their petition for writ of error in this case submitted and filed herewith, assign the following errors which the defendants aver and say occurred in the proceedings and at the trial in the above-entitled cause and in the above-entitled court, and upon which they rely to reverse, set aside and correct the judgment and sentence entered herein, and say that there is manifest error appearing upon the fact of the record and in the proceedings, in this:

1. The Court erred in permitting the introduction, over defendants' objection, to the testimony relating to any alleged conspiracies, except that conspiracy testified to by Ratcliff as being the one that he had entered a plea of guilty to. That the Government, by calling Ratcliff as a witness, after his plea of guilty, had elected to try the conspiracy included in the plea of guilty and only that conspiracy.

2. The Court erred in refusing to strike the testimony relating to conspiracies other than those to

which Ratcliff testified that he was a member and to which he had plead guilty. [59]

3. The Court erred in overruling the demurrer to each of the counts of the indictment.

4. The Court erred in overruling the motion to compel the Government to elect, at the conclusion of the Government's case, upon which conspiracy, of the many concerning which evidence had been introduced, the Government would rely for a conviction.

5. The Court erred in denying the motion for a directed verdict of each of the defendants at the conclusion of the Government's case, when each of the defendants challenged the sufficiency of the evidence, and the Court also erred in overruling the several and separate motions of the defendants, at the close of the Government's case, for a directed verdict and for a dismissal of said action, and for an instruction instructing the jury to find the several defendants not guilty, the sufficiency of the evidence being challenged.

6. The Court erred in permitting, over the objection of defendant Fowler, the witness Sarah Lewis to take the stand before defendant Fowler, to be interrogated as follows:

Q. Do you know Lemuel Fowler? A. Yes.

Q. How long have you known him?

A. Oh, ten years, I should judge; nine or ten years.

Q. At Auburn?

A. At Seattle and Auburn.

Q. How long has he been a roomer at your hotel? A. Ever since he has been in Auburn.

Q. You knew he was arrested, charged and convicted of stealing during that time?

Mr. DORE.—I object to that as incompetent, irrelevant and immaterial.

Mr. SAUNDERS.—I think, your Honor, we have a right to ask.

The COURT.—Objection overruled.

Q. Answer the question, please.

A. Yes, I did. [60]

7. The Court erred, in permitting, over the objection of defendant Fowler, the Government, on cross-examination, to make the following inquiry:

Q. You left the employ of the N. P. in 1917?

A. Yes, sir.

Q. Under conviction of theft from cars?

Mr. DORE.—I object to that as incompetent, irrelevant and immaterial.

Q. And you left the employ of the Northern Pacific as a brakeman when you were convicted of theft from box-cars?

A. I plead guilty to petit larceny; yes, sir.

Q. From a box-car? A. No, sir.

Q. From the railroad? A. No, sir.

Q. From what, then?

A. For having the goods in my possession.

Q. That came from the box-cars,—stolen goods? A. They came from box-cars?

Q. I am asking you, you plead guilty to having stolen goods in your possession?

A. Yes, sir.

Q. That was stolen from box-cars?

A. Yes, sir.

Q. And you have not been in the railway employ since? A. No, sir.

8. That the Court erred in passing upon said objection and stating in the presence of the jury that there is a moral turpitude in conviction for larceny, whether it is grand or petit, and instructing the jury that it only bears [61] if the witness admits that he was convicted,—it only bears on his credibility as a witness,—the instruction being incorrect, the only ——— to credibility is whether or not the defendant had been convicted of a felony.

9. The Court erred in admitting, over defendant's objection and exception, the following questions and answers by John Winkvist, a witness for the Great Northern and a special agent for the Northern Pacific Railway Company:

Q. From your performance of those duties as special agent, have you learned the methods whereby goods are and may be stolen from sealed cars, without breaking the seals? Please explain them to the jury.

Mr. DORE.—I object to that as incompetent, irrelevant and immaterial, the methods by which cars may be broken into without breaking the seals.

The COURT.—Objection overruled.

Mr. DORE.—We desire an exception.

The COURT.—Allowed.

A. At the bottom of the side door of a car are lugs that hold the door in place. These

lugs are held there by bolts screwed through the beam of the car. The nuts on the inside can be taken off, the bolts taken out, the lugs removed, and the door swung out so a man can enter.

Q. Without breaking the seal?

A. Without breaking the seal.

Q. Can a door be fixed up in its former condition to look just like it did before?

A. Yes, sir; everything can be replaced.

Q. Are there other methods by which a car can be pilfered?

Mr. DORE.—I object to that as incompetent, irrelevant and immaterial, and not within the issue. [62]

The COURT.—Objection overruled. That is, without breaking the seal?

Mr. DORE.—We desire an exception.

A. No, that is the only thing that I know of right now.

10. Thereafter and within the time limited by law and the order and rules of this Court, said defendants and each of them moved for a new trial, which said motion was overruled by the Court, and an exception allowed the defendants, which ruling of the Court the defendants now assign as error.

11. That thereafter, and within the time limited by law, the defendants moved the Court that judgment and sentence upon the verdict rendered in the above-entitled cause be arrested and stayed, which motion was overruled by the Court and exception

allowed the defendants, and now the defendants assign as error the overruling of said motion.

12. The Court thereafter entered judgment and sentence against said defendants and each of them upon the verdict of guilty rendered upon said indictment, to which ruling and judgment and sentence the defendants and each of them excepted, and now the defendants assign as error that the Court so entered judgment and sentence upon the verdict.

And as to each and every of said assignments of error, as aforesaid, the defendants say that at the time of making of the order or ruling of the Court complained of, the defendants duly asked and were allowed an exception to the ruling and order of the Court.

JOHN F. DORE,
Attorney for Defendants, Lemuel S. Fowler and
Thomas Singer. [63]

Acceptance of service of within Assignments of Error acknowledged this 21st day of June, 1920.

ROBT. C. SAUNDERS,
Attorney for Plaintiff.

[Indorsed]: Assignments of Error. Filed in the United States District Court, Western District of Washington, Northern Division. June 21, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [64]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEMUEL S. FOWLER et al.,

Defendants.

**Order Allowing Writ of Error and Fixing Amount of
Bond.**

A writ of error is granted this 21st day of June, 1920, and it is further ORDERED that said defendant Lemuel S. Fowler be admitted to bail, and the amount of the supersedeas bond to be filed by said defendant Lemuel S. Fowler be as follows: \$5,000.00, and it is further ORDERED that upon said defendant Lemuel S. Fowler filing his bond in the aforesaid sum, to be approved by the clerk of this Court, he shall be released from custody pending the determination of the writ of error herein assigned.

Done in open court, this 21st day of June, 1920.

EDWARD E. CUSHMAN,

Judge. [65]

[Endorsed]: Order Allowing Writ of Error and Fixing Amount of Bond. Filed in the United States District Court, Western District of Washington, Northern Division. June 21, 1920. F. M.

Harshberger, Clerk. By S. E. Leitch, Deputy.
[66]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEMUEL S. FOWLER, GEORGE E. WHITE,
CLARENCE H. BELLAMY, ALBERT
BRUCE PARIS, THOMAS E. JONES,
EDWARD BOURDELL, SARAH JONES,
JOE VEAGUS, HERBERT WILLIAM
HANSON, ETHYL HANSON, WILLIAM
RATCLIFF, JAMES FRANCIS MELLI-
SON, THOMAS SINGER, DAVID JONES,
CREED LANE, GEORGE H. TREPAN-
IER and Mrs. J. A. LEWIS,

Defendants.

**Order Allowing Writ of Error and Fixing Amount of
Bond.**

A writ of error is granted this 21st day of June, 1920, and it is further ORDERED, said defendant Thomas Singer be admitted to bail, and the amount of the supersedeas bond to be filed by said defendant Thomas Singer be as follows: \$5,000.00 and it is further ORDERED that upon said defendant Thomas Singer filing his bond in the aforesaid sum, to be approved by the clerk of this Court, he shall

be released from custody pending the determination of the writ of error herein assigned.

Done in open court, this 21st day of June, 1920.

EDWARD E. CUSHMAN,
Judge.

G. O. B. 8, page 203.

[Endorsed]: Order Allowing Writ of Error and Fixing Amount of Bail Bond. Filed in the United States District Court, Western District of Wash., Northern Division. June 21, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [67]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LEMUEL S. FOWLER, GEORGE E. WHITE,
CLARENCE H. BELLAMY, ALBERT
BRUCE PARIS, THOMAS E. JONES,
EDWARD BOURDELL, SARAH JONES,
JOE VEAGUS, HERBERT WILLIAM
HANSON, ETHYL HANSON, WILLIAM
RATCLIFF, JAMES FRANCIS MELLIS-
SON, THOMAS SINGER, DAVID JONES,
CREED LANE, GEORGE H. TREPAN-
IER and Mrs. J. A. LEWIS,
Defendants.

Recognizance of Lemuel Fowler.

The United States of America,
Western District of Washington,
Northern Division,—ss.

BE IT REMEMBERED that on this 21st day of June, 1920, before me, F. M. Harshberger, Clerk of the District Court of the United States, within and for the aforementioned court, personally appeared Lemuel S. Fowler, and acknowledged himself to owe the United States of America the sum of \$5,000, Five Thousand Liberty Bonds herewith deposited in said court in bonds of the United States if default should be made in the following condition, to wit:

The condition of this recognizance is such that whereas said Lemuel S. Fowler was on the 21st day of June, 1920, sentenced in the above-entitled cause to pay a fine of \$500.00 on each count, a total of \$1,500.00 and to serve a term of imprisonment at 18 months at U. S. Penitentiary at McNeil Island, to run concurrently, and whereas said defendant has sued out a writ of error to the Ninth Circuit Court of Appeals, and whereas the Court has fixed the defendant's supersedeas bond to stay execution on said sentence,—

NOW, THEREFORE, if said defendant shall prosecute his said writ of error diligently and to effect and shall obey and abide by and render himself amenable [68] to all orders which said Appellate Court shall make or order to be made and shall perform any judgment made and entered by

said Appellate Court including the payment of any judgment on appeal, and shall not leave the jurisdiction of this Court without leave first had and obtained, and shall obey and render himself amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, and shall, pursuant to any such order, surrender himself, and will obey and perform any judgment of the Circuit Court of Appeals, then this recognizance to be void; otherwise to remain in full force and effect.

LEMUEL S. FOWLER.

Taken and acknowledged before me this 21st day of June, 1920.

[Seal]

LEETA D. MANNING,
Deputy Clerk of the United States District
Court.

O. K.—ROBT. C. SAUNDERS.

Approved.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Recognizance of Lemuel Fowler. Filed in the United States District Court, Western District of Washington, Northern Division. June 21, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [69]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LEMUEL S. FOWLER, GEORGE E. WHITE,
CLARENCE H. BELLAMY, ALBERT
BRUCE PARIS, THOMAS E. JONES,
EDWARD BOURDELL, SARAH JONES,
JOE VEAGUS, HERBERT WILLIAM
HANSON, ETHYL HANSON, WILLIAM
RATCLIFF, JAMES FRANCIS MELLI-
SON, THOMAS SINGER, DAVID JONES,
CREED LANE, GEORGE H. TREPAN-
IER and Mrs. J. A. LEWIS,
Defendants.

Bail Bond of Thomas Singer.

KNOW ALL MEN BY THESE PRESENTS,
That we, Thomas Singer, as principal, and George
C. Rickhard and Adolph Behrens, as sureties, are
held and firmly bound unto the United States of
America, plaintiff in the above-entitled action, in
the penal sum of *Five Thousand* (\$5,000), lawful
money of the United States, for the payment of
which, well and truly to be made, we bind ourselves,
our and each of our heirs, executors, administra-
tors, successors and assigns, jointly and severally,
firmly by these presents,

The condition of this obligation is such that whereas the above-named defendant Thomas Singer was, on the 21st day of June, 1920, sentenced in the above-entitled cause, to serve for a period of thirteen months in the United States penitentiary at McNeil Island, sentence to run concurrently, in the State of Washington, and was fined in the sum of Five Hundred Dollars on each count, a total of Fifteen Hundred Dollars; and

Whereas, said defendant has sued out a writ of error from the sentence and judgment in said cause to the Circuit Court of Appeals of the United States for the Ninth Circuit; and

Whereas, the above-entitled court has fixed the defendant's bond, to stay execution of the judgment in said case, in the sum of [70] Five Thousand Dollars:

Now, Therefore, if said defendant, Thomas Singer, shall diligently prosecute his said writ of error to effect, and shall obey and abide by and render himself amenable to all orders which said Appellate Court shall make or order to be made in the premises, and shall render himself amenable to and obey all process issued, or ordered to be issued by said Appellate Court herein, and shall perform any judgment made or entered herein by said Appellate Court, including the payment of any judgment on appeal, and shall not leave the jurisdiction of this court without leave being first had, and shall obey and abide by and render himself amenable to any and all orders made or entered by the District Court of the United States for the Western Dis-

trict of Washington, Northern Division, and will render himself amenable to and obey any and all orders issued herein by said District Court, and shall, pursuant to any order issued by said District Court, surrender himself, and will obey and perform any judgment entered herein by said District Court of Appeals or said District Court, then this obligation to be void; otherwise to remain in full force and effect.

Sealed with our seals and dated this 21st day of June, 1920.

THOS. S. SINGER.

GEORGE C. RICKHARD.

ADOLPH BEHRENS.

United States of America,
State of Washington,
County of King,—ss.

George C. Rickhard, Adolph Behrens, being first duly sworn, upon oath, each for himself *and herself*, and not for the other, says: I am a resident of the State of Washington, over the age of twenty-one years, and not an attorney, counselor-at-law, sheriff, clerk of the Superior Court, or other officer of such court, or any other court; [71] that I am worth, over and above all debts and liabilities, and exclusive of property exempt from execution, in real estate situate within King County, Washington, as follows: Adolph Behrens, \$5,000; George Rickhard, \$5,000.

GEORGE C. RICKHARD.

ADOLPH BEHRENS.

Subscribed and sworn to before me this 21st day of June, 1920.

[Seal] LEETA D. MANNING,
Deputy Clerk U. S. District Court, Western District of Washington.

Approved.

EDWARD E. CUSHMAN,
Judge.

O. K.—ROBERT C. SAUNDERS,
U. S. District Atty.

B. & S., page 101.

[Endorsed]: Bail Bond of Thomas Singer. Filed in the United States District Court, Western District of Washington, Northern Division. June 21, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [72]

United States District Court, Western District of Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

LEMUEL S. FOWLER,
Defendant.

**Order Extending Time to File Proposed
Amendments to Bill of Exceptions.**

On motion of the United States Attorney, John F. Dore, Esquire, as attorney for the defendants,

Lemuel S. Fowler and Thomas Singer, being present and consenting thereto,—

IT IS ORDERED that the time within which proposed Amendments to the proposed bill of exceptions filed with the clerk on behalf of the defendants last above named be, and the same is, hereby extended to and until fifteen days beyond the time provided by rule.

FRANK H. RUDKIN,
United States District Judge.

O. K.—JOHN F. DORE,
Attorney for Defendants.

G. O. B. 8, page 191.

[Endorsed]: Order. Filed in the United States District Court, Western District of Wash., Northern Division. July 13, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [73]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LEMUEL S. FOWLER, THOMAS SINGER, et al.,
Defendants.

Bill of Exceptions.

BE IT REMEMBERED, that on the 25th day of May, 1920, at the hour of ten o'clock A. M., the above-

entitled court before the Honorable Edward E. Cushman, Judge thereof; the plaintiff appearing by Robert Saunders, United States Attorney for said District, and by Fred R. Conway, Assistant United States Attorney for said District, and the defendants being present in person and by their counsel as follows: Defendant Lemuel S. Fowler, by his attorney John F. Dore, and defendant Thomas Singer by his attorney Wilmon Tucker.

A jury having been regularly and duly impanelled and sworn to try the cause, and the Assistant United States Attorney having made a statement to the jury, the following evidence was thereupon offered:

Mr. MORRIS.—May it please your Honor, heretofore in this court, the defendant William Ratcliff entered his plea of not guilty to Indictment No. 5249, I believe. At this time Mr. Ratcliff desires to withdraw his plea of not guilty to said indictment.

The COURT.—There are three counts in this indictment.

Mr. MORRIS.—It is the conspiracy indictment.

The COURT.—There are three conspiracies charged; the conspiracy to [74] defraud, and the conspiracy to violate one section and then a conspiracy to violate another section. Does he wish to plead guilty to all three counts?

Mr. SAUNDERS.—I so understand, your Honor.

Mr. MORRIS.—It is agreeable to the defendant.

The COURT.—Am I correctly advised,—do you desire to withdraw your plea of not guilty and plead guilty to the three counts in the indictment?

Mr. RATCLIFF.—Yes, sir.

The COURT.—Let the records be changed and the plea of guilty entered to each of the three counts. Move for sentence.

Mr. SAUNDERS.—The Government does not move for sentence, your Honor, but asks that it be postponed.

Testimony of William Radcliff, for the Government.

WILLIAM RADCLIFF a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

My name is William Radcliff. I am thirty-nine years of age, and by occupation a railroad conductor; I have been a railroad conductor for twelve years, working for the Northern Pacific Railway Company. I ran on the division from Auburn to Ellensburg and Ellensburg to Auburn. I have lived in Auburn since June 16, 1916. I am a married man and have a family. I was a freight conductor running on freight trains. The trains are classified as an "Extra" from Auburn to Ellensburg and from Ellensburg back to Auburn. Auburn is the terminus of the Seattle Division of the Northern Pacific Railroad, and the freight-yards and roundhouse is there. They handle in the freight-yards an average of five hundred cars a day; there are in the yards nine day crews and seven night crews, numbering about a hundred men including engineers and switchmen. The crews make up the trains as they come in, break them up and make them up for the various points they are billed to. From the Auburn yards to Covington is

(Testimony of William Rateliff.)

eight miles. On the other side of Covington is Mile Post 91; that is, counting from Ellensburg West. The grade from Auburn to Lester is one per cent; the grade [75] from Lester to the summit is 2.2; from the summit to Easton is 2.2 going east; and eight-tenths of one per cent from Easton Ellensburg. I'd make a round trip on an average of three days and a half; the average time for the month would be twelve hours a trip; twelve to fourteen.

From March 1918, up to the finding of the indictment, the train crew consisted of three brakemen besides myself, the conductor. The head brakeman rides the engine; the other two ride the caboose. The caboose is carried on the rear end of the train, and has a cupola for a lookout over the train on both sides. Inside the caboose is the clothes locker, toilet and lockers for coal and tools, there is just one clothes locker, and this is accessible to the four men of the crew.

On March 20th, 1920, I made a trip from Ellensburg to Auburn, leaving Ellensburg at 9:00 A. M. and arriving at Auburn at 4:30 P. M. the same day. C. H. Goldman, Dave Jones and H. W. Hanson were my brakemen on the trip.

I heard a conversation between the defendants Dave Jones and H. W. Hanson in my caboose on that trip about getting shoes. They said they were going to get four cases of shoes and that they had a sale for them. The four cases of shoes were in the Northern Pacific freight-car; in the P. F. E. refrigerator-car. The train consisted of forty-five cars carrying mer-

(Testimony of William Radcliff.)

chandise, coal, iron and tin; way bills and manifest were in the caboose showing whether the cars contained merchandise or commodities. On the east side of the divide before we got to Easton, I heard the defendants Jones and Hanson in conversation. After the conversation they carried the four cases of shoes off of the train and put them in the salal brush, about Mile Post 91,—about three miles east of Covington. The train stopped at this point because of a hot-box on a car of coal; it stopped about 30 minutes. I saw the defendants Jones and Hanson take these shoes in their boxes from the car and cache them in the salal brush. It was about 2:30 P. M. The train then proceeded to Auburn and arrives there at 4:30 P. M.

Mr. Hanson said he had a sale for the shoes and the money would be equally divided between the three of us. He gave samples of the shoes to a man named Ayers to be sold in Renton and got a price for them [76]

The document marked Government's Exhibit "I" is a Wheel Report of my train on that date. The figures and writing is in my handwriting, and shows that the shoes were being transported in Car P. F. E. 12,320.

Here Wheel Report was admitted as Government's Exhibit "I."

Witness identifies cases of shoes as those having been taken out of the car and cached in the salal brush, by defendants Jones and Hanson near Mile

(Testimony of William Radcliff.)

Post 91. They were admitted in evidence as Government's Exhibits 2, 3 and 4.

Between the time the shoes were taken out of the car and hidden, and now, I have seen two cases of them.

On the evening of March 27th last, I had a talk with Hanson about these shoes; also with Mrs. Hanson and a man named Ayers. Hanson and his wife live about a mile from my house at Auburn. William Hanson came to my house that day in an automobile; my wife was there at that time. Hanson proposed that we go up and get the shoes in the salal brush near Mile Post 91. We held a conversation with Ayers. Ayers was in his car, and Hanson's car was standing close to Ayers' car at the corner of Main and Enumclaw Road. Hanson said that a sale had been made; he said that samples had been furnished Ayers, and that Ayers had made a deal with Rogers at Renton, a dollar and a half for the canvas shoes and three dollars for the other shoes. Ayers was to get a commission of 60¢ a pair for selling the shoes, on delivery.

I got into Hanson's car, with Mrs. Hanson and Herbert William Hanson. Hanson's car went first and was followed by Ayers' car containing Ayers alone. They walked up into the salal brush, and after about thirty minutes got two cases of shoes that I have identified here, carried them down to the road and loaded them into Ayers' car. We then went to Auburn. On arriving at Auburn, Hanson said he was tired, and asked me to go to Renton and collect the

(Testimony of William Radcliff.)

money. We went up to the foot of the Pacific Highway where it meets the road leading to cemetery hill. Ayers signalled with a spotlight and waited twenty minutes. We then drove back to Auburn.

Ayers and I went to the St. Elmo Hotel, owned by Mrs. J. A. Lewis, one of the defendants here. It was about 12:30 A. M. on the morning of the 28th. I rang the office bell and she came down to the door. I asked for Fowler; I told her that Ayers had an agreement to meet him that night with some tires she said he was up [77] on the hill getting some tires. Then I told her I had a shoe deal. She said "Who is the man?" I says: "I don't know." I told her they were sold in Renton, and the man was recommended to me by Hanson as having done quite a bit of business with him before and he was all right. She said nothing else.

Ayers and I got into the machine and went out to the foot of cemetery hill, worked a signal a few times on the side of the hill, and Fowler's car was seen coming down with yellow headlights on. Fowler's car came within fifty feet of the rear of the machine we were in, and contained Fowler and a man unknown to me, and twelve automobile tires. I later saw the tires when they were unloaded at Renton. I did not hear Fowler say anything when he drove up. I looked out of the car and I could see Fowler and Ayers talking a couple of minutes; I did not hear them. Ayers then drove his car to Renton, followed by Fowler. I rode in Ayers' car. We got to Renton and went into the alley to the garage; it was Rogers'

(Testimony of William Radcliff.)

garage; we waited while Ayers went and notified Rogers that the goods had arrived; in a little while Mr. Rogers came down and opened up the sliding-doors of the garage; Ayers drove in and unloaded the shoes, two cases of which I have identified; as Ayers backed out of the garage, Fowler drove in; as Ayers backed out, the deputies came in.

Rogers says: "Count the shoes while I help him get those tires out." Then the sheriffs came in and arrested the three of us, myself, Fowler and Mellison; Mellison was the man who had come down the hill in Fowler's machine. Ayers worked an automatic on the sheriffs and backed the car out of the garage. He has been seen in Auburn several times since. The automatic revolver was taken off Fowler. Mellison, Fowler and I were taken to jail. The Chinese matting offered in evidence as Government Exhibits 5 and 6, were taken off my train on March 2d, 1920. The matting came out of a Pennsylvania car. The members of my crew were C. H. Goldman, Dave Jones and W. H. Hanson. Goldman was head brakeman; Dave Jones and Hanson were also brakemen. Jones and Hanson took the two rolls of matting out of the car at Easton. Before they took them, Hanson told me he was going to get some matting. The matting was left on the right of way at Easton until we came back. The matting was thrown out of the car at 11:15 P. M. We got back to [78] that place at 6 P. M. on the 3d. Jones and Hanson picked up the matting and threw it into an empty car,

(Testimony of William Radcliff.)

and it was hauled to Covington and put off in the brush by Hanson and Jones.

Hanson afterwards went up in the automobile and got the matting, and left two rolls at my house. He left it on the morning of the 4th.

I identify Government's Exhibit 7 as a Wheel Report, showing that the matting was being hauled out from Auburn towards Ellensburg, on the Pennsylvania Railroad 43,493. Car was marked "bad order." It had a defective door. The top was open at least eighteen to twenty inches, and was not connected on the top.

The Wheel Report is made up from waybills; these bills are given to me by the yard clerk, and I deliver them to the man at the next division; while the train is moving; waybills are kept in a desk in the caboose; the brakemen and conductor have access to them, as the desk is not locked. Waybills showing the car that contained the matting were in my desk in the caboose. The Wheel Report is made out just before we leave the terminal, and at the end of the run is turned over to the yardmaster; Wheel Reports are made in triplicate.

I know the defendant Trepanier; he was a brakeman and ran as part of my crew a few trips. He lived in Auburn. Late in October, 1918, Trepanier brought an electric drill to my house. I had some work to do but could not use the drill. Trepanier told me he had one,—said he had gotten it out of a railroad car a couple of months prior to that time. The drill was an electric, Tempco single motor drill.

(Testimony of William Radcliff.)

I had it about seven days, and Mr. Trepanier came and took it away. I could not identify the drill; there are hundreds like it and I did not get the number of it. I failed as a conductor to protect the property of the railroad company.

Mrs. Lewis is the proprietor of the St. Elmo Hotel, at Auburn, Washington. Fowler rooms in her hotel; how long he has roomed there I don't know.

The waybill for the shoes was also in my caboose.
[79]

Cross-examination.

(Questions by Mr. DORE.)

Q. Mr. Ratcliff, you were the conductor on these two trains? The train that the shoes came off of, and the train that the matting came from?

A. Yes, sir.

Q. And the agreement—the conspiracy to rob the railroad, to which you have pleaded guilty, consisted of an agreement to steal from the car upon which the shoes were, and the cars upon which the matting was—that was the criminal conspiracy that you were a part of? A. Yes.

Q. With which of these defendants did you ever enter into an agreement to commit a crime against the railroad? A. Hanson and Jones.

Q. Hanson and Jones. Those are the only two?

A. Yes, sir.

Q. Those are the only two people of all these defendants that you had any agreement to violate any of the laws of the railroads belonging to the United States?

(Testimony of William Radcliff.)

A. Yes, sir.

Q. And these three conspiracies to which you have entered a plea of guilty included both of your co-conspirators, Hanson and Jones, and no other persons in this court?

A. Yes, sir.

Q. You never, in other words, had any agreement to commit any crimes with George H. White?

A. No, sir.

Q. And you didn't plead guilty to any crime to which he was a party? A. No, sir.

Q. And you never had any agreement to commit any crime with Clarence H. Bellamy. [80]

A. No, sir.

Q. And you had no agreement to commit a crime with Albert Bruce Paris? A. No.

Q. And you had no agreement to commit any crime or crimes with Thomas E. Jones? A. No.

Q. Or with Edward Bourdell?

A. No.

Q. Or with Sarah Jones? A. No.

Q. Or Joe Vargus? A. No.

Q. But you did with Herbert William Hanson?

A. Yes, sir.

Q. And you did with Ethel Hanson, so far as you have related? The only connection, I understand, that she had with that affair, is that she was a passenger in this car the day you went to get the tires?

A. Yes.

Q. That is all the connection she had, she just rode along to get the tires? A. Yes.

(Testimony of William Radcliff.)

Q. That is all the connection she had? She just rode along when you went out in the car to get the tires and to get the shoes? A. Yes, sir.

Q. That is all Ethel Hanson had to do with it. She was the wife of Herbert William Hanson. William Ratcliff is yourself. With James Francis Mellison, you never had any agreement of any kind?

A. No, sir.

Q. All you know about Mellison is, when Fowler came down the road in an automobile that had some tires, Mellison was with him, isn't that true?

A. A man unknown to me.

Q. Afterwards you learned him to be Mellison?

A. Yes, sir. [81]

Q. After he was arrested. You never knew Millison before he was arrested? A. No, sir.

Q. Consequently you never had any dealings or agreement or conversations relating to theft with Millison? A. No.

Q. And Thomas Singer. I take it you never heard of Thomas Singer in your life until you met him here in this court. You never had any dealings with Thomas Singer? A. No, sir.

Q. He was a party to no crime of conspiracy which you were ever in. And David Jones, he was in this one that you are in? A. Yes, sir.

Q. Creed Lane, you never had anything to do with him? A. No, sir.

Q. And Trepanier, all you had to do with him was that you told him you needed an electric drill to do some work with, and he brought an electric drill down

(Testimony of William Radcliff.)

to your house; isn't that true? A. Yes, sir.

Q. You and he never stole the drill together?

A. No, sir.

Q. You had no agreement to steal it? A. No.

Q. You had personally nothing to do with the drill except using it?

A. I did not use it; I could not use it.

Q. Trepanier knew; he was on the train that you were running a couple of times? A. Yes, sir.

Q. Those times, nothing was stolen; is that right?

A. Yes, sir.

Q. Nothing was stolen then? A. No. [82]

Q. As I understand, Mrs. J. A. Lewis,—stand up, Mrs. Lewis,—that is Mrs. Lewis? A. Yes, sir.

Q. She is the owner of the St. Elmo Hotel in Auburn? A. Yes, sir.

Q. That is the largest hotel in Auburn, is it?

A. Yes.

Q. It is a hotel of fifty or sixty rooms. Auburn is a railroad town? A. Yes, sir.

Q. The population, or the chief occupation of the majority of the population is railroading, isn't it?

A. Yes, sir.

Q. The railroad group makes up the great part of the population. The occupants of practically all the hotels, including the St. Elmo Hotel, are railroad employees, aren't they? A. Yes, sir.

Q. And Fowler lives at the St. Elmo Hotel; isn't that true? A. That I don't know.

Q. You never had any agreement with Mrs. Lewis to rob any box-cars, and steal anything, in inter-

(Testimony of William Radcliff.)

state commerce? A. No, sir.

Q. You never had any transaction with her in regard to stolen property or anything like that?

A. No, sir.

Q. As I understand, all you know about Mrs. Lewis—the only dealings she had with you, you went to her hotel one night and asked where Fowler was? A. Yes.

Q. And she told you that Fowler had gone up on a hill to get some tires? A. Yes, sir.

Q. And you told her that you were selling some shoes, did you? A. Yes, sir. [83]

Q. She asked you to whom you were selling the shoes? A. Yes.

Q. And you told her to a man named Ayers; is that it?

A. A man named Ayers was the salesman and the purchaser was Rogers in Renton.

Q. She had nothing to do with either Ayers or Rogers so far as you know?

A. Absolutely nothing.

Q. And absolutely all she had to do with you was, she came to the door of the hotel when you inquired for Fowler, and said she thought Fowler was up on the hill getting some tires; is that right? A. Yes.

Q. Now, this fellow Fowler, he runs a stage or jitney, up here in Auburn; that is his occupation?

A. I don't know.

Q. You don't know that he does that? A. No.

Q. All you know about Fowler that night is that he came along the road with an automobile in which

(Testimony of William Radcliff.)

the tires were? A. Yes, sir.

Q. You had nothing to do with those tires?

A. No, sir.

Q. You were not connected with those tires any more than I am connected with them?

A. No, sir.

Q. You never stole them, never conspired to steal them; never agreed to steal them with anyone, nobody agreed to steal them with you, or to have anything to do with those tires so far as you are concerned? Is that right? A. That is right.

Q. The conspiracy that you are in included only you, and David Jones and Mr. Hanson; is that right? A. Yes, sir. [84]

No terms were made to me for pleading guilty. I wanted the drill because I was doing some work on a patent car lock,—so that the seal could be abolished and a lock used. Hanson, Jones and myself are equally guilty of stealing shoes and matting. I was the conductor. Jones was the middleman and Hanson was the rear man. The head brakeman stays on the engine and handles the head end of the train; to head the train in and out of sidings. He doesn't attend to hot-boxes or broken bars unless it is close to the end of a long train. The head brakeman takes his orders from the engineer when he is on the train, and all the brakemen are responsible to the conductor.

Lozby was the engineer on the train on the 20th of March. There was a pilot on the train from Leslie to Auburn; his name was Hutchinson; there

(Testimony of William Radcliff.)

was no one else on the train. I walked down the left side of the train when it stopped in a bend in the track, and Jones and Hanson walked down the right side. I went to the rear of the train; Goldman was on the engine; Hutchinson stayed on the caboose. I later went down into the salal brush looking for the shoes, together with Payne, Campbell and Lovell.

Testimony of Roy Ayers, for the Government.

Direct Examination.

I am thirty-two years old. I went to Auburn in November, 1919, and engaged in and carried on a garage business; I was in business there three months; from the time I went to Auburn in November, I was in the employ of the N. P. Railroad, as special investigator, for the purpose of looking up these box-car thieves, so called. I know the defendant Lemuel S. Fowler. I don't know Bellamy, White, Paris. I do not know Thomas E. Jones, Ed Bourdell or Sarah Jones, or Joe Vargus. I know Herbert William Hanson, and Mrs. Hanson, and William Radcliff. I know the defendants J. F. Mellison, David Jones and Creed Lane. I do not know the defendant Thomas Singer or George Trepanier. I know Mrs. J. A. Lewis.

Q. Now, while you were in the garage business at Auburn, did you [85] have negotiations and dealings with these defendants, or any of them, concerning stolen property? A. Yes, sir.

Q. Now, begin at the beginning; who was the first

(Testimony of Roy Ayers.)

defendant, and what was it about, and about when?

Mr. DORE.—Now, your Honor, I object on the ground that it is incompetent, irrelevant and immaterial for this reason: Mr. Ratcliff has pleaded guilty to three conspiracies. He said that there was no one in those conspiracies except Jones and Hanson. The Government must try one single criminal agreement here, or at least the three criminal agreements which they have elected by Ratcliff's testimony to bind themselves before the doings of the other defendants become admissible with this great mass of stuff that is here. The Government must first connect these defendants with Ratcliff and with this conspiracy that, according to their own testimony at this time, there was no one in except Mrs. Hanson, Mr. Hanson and Dave Jones. You can't try a score of conspiracies, or a score of groups, or a score of different crimes here. It is true the agreement may be single, and the object of it may be multiform, that is true, but still before testimony as to what other defendants did or said to this man, or what dealings he had with him, they must be brought within the scope of this conspiracy. Now, to narrow this case, we demand at this time, or at least to save time, the Government state to the Court what conspiracy they are trying here, and who they intend to prove the conspirators are, and they be permitted to introduce no testimony against any defendant except such as they may state to the Court their proof will show to be members of the conspiracy that

(Testimony of Roy Ayers.)

Ratcliff has already testified to.

The COURT.—I cannot rule of what the evidence shows in advance of hearing the evidence. Objection overruled. [86]

The first defendant was Hanson. About the 15th of November last he came into the garage to have some work done on his car. He had two new rear tires on the machine, and he wanted me to change the tires around so that the numbers would be on the inside, that they were stolen tires; I made the change for him; he asked me if I could use some shoes; I told him I could; he brought me up a pair as a sample; I tried them on in the presence of a man named Corly or Coby, and Scott. I kept the shoes around the shop; Hanson said he had thirty-six tires that he would sell me at \$10.00 a tire; I took the thirty-six. I agreed to take the tires, but he could not get them to me for some reason, as they were twenty or thirty miles this side of Easton, and he couldn't get them down to Auburn and they were delayed in that way.

On March 27th I met Scott; he was a conductor on the Northern Pacific. On March 27th I went down to Hanson's house; Mrs. Hanson was there; I talked to Hanson about some shoes he had out on the road at the 91 Mile Post. I told him I had a conversation with "Slim" Fowler, and Fowler was going to sell me the twelve tires that night. On March 27th I had a conversation with Fowler about the tires; he said they were all large tires, 35, 36, 4½ or something like that.

(Testimony of Roy Ayers.)

Mr. DORE.—I object to this testimony and move that it be stricken, as the testimony shows at this time Fowler was not a member of the conspiracy that Ratcliff has testified to.

The COURT.—The objection is overruled and the motion denied.

Fowler told he that the tires were shady and I would have to get them at night. I told him I had a good fence over in Renton, to whom I could dispose of the tires; I told him to meet me there at 10 or 11 o'clock, some time after dark, and we would go and get the tires and shoes and deliver them all at one time. Hanson took me down to Ratcliff's house and introduced me to Ratcliff; then Ratcliff and Hanson and Mrs. Hanson and I went out in my machine and Hanson's machine to get the shoes. We went on the Maple Valley road; it is about two miles off the highway, and left the cars thirty feet off the track, walked up to the 91 Mile Post, which is about half a mile, I should judge, from the crossing. We hunted around [87] the woods for some time before we come across this one box of shoes; we couldn't find the others; there was supposed to be a sack and another box of freight there. I found one box of Peters shoes and Hanson found the other one. I can identify Government's Exhibits 4 and 3. We carried the shoes down the track to the cars. I put them in my machine and rode back to Auburn. There were two machines, one carried Ratcliff and myself and the shoes, and the other carried Mr. and Mrs. Hanson. Hanson said he

(Testimony of Roy Ayers.)

had to go to work in the morning and would not go to Renton with me; but Ratcliff would go down and collect the money; Hanson then went home.

I told *than* that I agreed with this "fence" at Renton to pay \$2.00 a pair for the shoes; I was to receive a commission. We got into Auburn about twelve o'clock. Fowler was to meet me in Auburn, but I could not find him. So I rode out to the highway, that is, the Tacoma-Seattle Highway from Auburn, and I was to blink my lights at a certain point to let Fowler know I was on the highway. I waited there for some time and he didn't appear. I returned to Auburn and met him in front of the St. Elmo Hotel. He said he had unloaded the tires, that he thought I wasn't coming back, I was so long. I told him to go and load up again and we would start for Renton; so Fowler went and loaded up; he loaded up his machine and I waited for him at the highway; he was gone half an hour or so, and he came back with a load of tires, and we then went to Renton. We got to Renton *and* one or one-thirty, and there met the deputies. When the deputies arrived at the garage, I drove my machine in the garage and unloaded it; unloaded the shoes I had in the machine. I backed out on to the alley, and Fowler drove his machine in and unloaded the tires, and while he unloaded them—I don't know what happened after that; I left the premises.

I identify these tires as the ones that were in Fowler's car.

Mellison, on the night of March 27th, told me he

(Testimony of Roy Ayers.)

had an interest in the tires. He was in Fowler's machine when I saw Fowler in Auburn, and he told me he had unloaded the tires, and he went with Fowler to load them up again and went to Renton with Fowler. [88] I cannot recognize Mellison.

Cross-examination by Mr. DORE.

I knew "Stew" Campbell, one of the deputy sheriffs at Renton, and I knew him pretty well. I have been in the employ of the railroad since November. Campbell arrested me for having stolen automobiles in my possession; I don't remember when I was arrested. The Northern Pacific bought the garage that I had at Auburn; it was merely a blind. I walked from the garage at Renton and Campbell shot at me.

I learned that Fowler had tires to sell through a conversation I had with Scott, a railway conductor. After Scott told me that Fowler had some tires to sell, Fowler came to me and told me that he had thirteen tires. I told him that I had a buyer at Renton who would buy them. I told Payne about Fowler and the tires on March 27th. Fowler was just an addition to the party.

Q. You picked him up accidentally?

A. Just accidentally.

Testimony of E. J. Hughes, for the Government.

My name is E. J. Hughes, and I am a deputy Sheriff of King County, Washington, and I have been for nearly four years. I saw Ayers and others at Renton on the night of March 27th and the early morning of March 28th last.

On March 23d I met Mr. Ayers; he was introduced to me by Payne, a special agent for the Northern Pacific. I went to Renton on March 27th; I was there from the 25th to the morning of the 28th. I rented Edwards' garage. I was in the garage all day of the 27th, and up to about 10:30 that evening, when I went home to bed. A little after two o'clock in the morning I had a call over the telephone to Seattle, and two other deputy sheriffs, Campbell and Lovell, came out there, and shortly after I opened the garage. I went in and turned the lights all on, and Ayers came in through the front door. Lovell went into a back room and kept in the dark. While Ayers was driving his car in, Deputy Sheriff Campbell [89] came in through the front door. Ayers' car was loaded with shoes. I had arranged prior to this with Ayers to receive these shoes and some automobile tires, which I was given to understand was stolen goods from the Northern Pacific Railroad. The shoes were unloaded. Ayers said to me, "Now, you understand you are to pay three dollars a pair for these shoes straight through." I said, "Yes, I understand that." He said, "Also twelve dollars a piece for the tires straight through." I said,

(Testimony of E. J. Hughes.)

“Yes, but I want to know how many pairs of shoes I am getting; I do not want to pay for something that I am not getting; I want a count on those shoes.”

After the shoes were unloaded from the machine driven in by Ayers, Ratcliff proceeded to count the shoes. I did not stay with them because I went to assist Ayers to back his machine out of the garage, and then Fowler got in his car and drove that in, and the tires were unloaded. Ayers backed his machine out through the alley into the street. After they had been all unloaded, I made some remark about the tubes that were to be brought to fit these tires; they told me there were no tubes to be brought with those tires, and at that time I drew my gun and told them to stick their hands in the air. Campbell was in the rear, and just about that time there was an alarm at the rear door, and Deputy Sheriff Campbell went to answer the alarm at the door. I presume it was Ayers at the door; some shooting occurred on the outside; I don't know why it was done. Fowler had an automatic revolver; it was a 32 or a 38. Deputy Sheriff Lovell took it away from him. I arrested Ratcliff, Fowler and Mellison and brought them to the County Jail; the goods were also brought to the County Jail. I could not identify the tires; I did not take any particular notice of them, other than that they were extra large cord tires. There was one box of ladies' canvas shoes and a box of children's shoes; they were light colored leather.

(Testimony of E. J. Hughes.)

I saw Hanson on March 28th at his house in Auburn. Deputy Sheriffs Campbell, Lovell and myself went to the house; it was probably between five and six o'clock in the morning. We placed Hanson and his wife under arrest and brought them to the County Jail. I found a tire in the house and also some liquor. I found only one tire; it was a new tire, the wrapping was still on it. [89½]

Cross-examination by Mr. DORE.

The first conversation I had with Ayers was on March 25th. I knew his name was Ayers. I knew all these facts on April 6. I testified before U. S. Commissioner McClelland on April 6th that Ayers' name was Morris or Morrison. I did not tell the commissioner that he had been introduced to me by the name of Ayers; I told the commissioner that he got away. I cannot explain why I so testified before the commissioner.

It was on March 25th that Ayers told me about the shoes and the tires; he told me at that time the tires were large-sized tires. Fowler had a gun in his pocket, and it was taken out of his pocket by Deputy Sheriff Lovell; it was in the outside overcoat pocket on the left-hand side. I had no conversation with Mellison; I do not recall what Fowler said in the garage.

I told the commissioner I made arrangements to buy those tires off a man who gave his name as Fred Morris, and also the shoes. Fowler, Millison

(Testimony of Stewart Campbell.)

and Radcliff were the only ones of the defendants who were in the garage that night; Ayers was also there.

Testimony of Stewart Campbell, for the Government.

Direct Examination.

I am a deputy sheriff and have been for six or seven years. About two o'clock in the morning of Sunday, March 28th, I was called from my home to go to Renton; I went to a garage in Renton. Fowler, Millison and Ratcliff were in the garage, as were Deputy Sheriffs Lovell and Hughes; I went into the back door of the garage. One car backed out and another drove in. I saw a couple of boxes of shoes standing there in the garage; the car that Fowler drove in had tires in it. Deputy Sheriff Lovell came out from behind a partition and Hughes stuck them up and took the guns away from them. Ayers went away as arranged.

Cross-examination by Mr. DORE.

I have known Ayers four or five months. I did not know who it was that shot at me; the man who did the shooting was the man running; I afterwards learned that the man who was running was Ayers. I knew it was arranged for [90] Ayers to get away; it was not arranged for him to shoot at anybody. I knew Ayers by a couple of other names. I arrested him in Auburn a couple of months ago for allowing stolen cars to be in his garage. At that time Scott was in jail in Bellingham. Scott was the man I wanted. I testified before the com-

(Testimony of N. L. Lovell.)

missioner on April 6th in this case. I testified at that time that I did not know Ayers' name; that he ran away and took two shots at me.

Testimony of N. L. Lovell, for the Government.

Direct Examination.

On March 28th I was, *I was* deputy sheriff of King County, and have been since August of last year. I saw Fowler, Ratcliff and Millison and a fellow by the name of Ayers in Renton on the morning of the 28th. Ayers drove a car into the garage that had shoes in it; Ratcliff was in the car with him; the shoes were unloaded in the garage, and he backed the machine out, and Fowler drove his machine in, containing tires, and unloaded them; after the goods were unloaded, Deputy Sheriff Hughes told them who he was, that they were under arrest, and I came out and assisted in making the arrest of Ratcliff, Millison and Fowler.

Exhibits 3 and 4 are the shoes that I saw in the garage that night. The tires marked \$8 for identification are the tires that were there. I heard some shooting outside, seven or eight shots were fired. I took an automatic revolver away from Fowler; it was a 32-caliber; it's a Colt's. I took the gun from Fowler's left-hand overcoat pocket; it was loaded.

Cross-examination by Mr. DORE.

Campbell and Ayers were the two men that were outside the garage at the time of the shooting. I

(Testimony of N. L. Lovell.)

knew on March 28th that Ayers was a decoy—that is, that he was working for Payne. I knew that his going away that night was part of a plan. I testified on April 6th, before the commissioner, that the man now called Ayers made his escape. I testified that I did not know Ayers. This was not the truth. I falsified so as to be able to use Ayers again. [91]

Testimony of Clifford W. Scott, for the Government.

Direct Examination.

I have been a conductor for the Northern Pacific Railway for six or seven years, running from Auburn to Ellensburg, on the Seattle Division. Mr. Trepanier and Mr. Hanson were once members of my train crew. I had a conversation with Hanson in the garage at Auburn in October or November, 1919, a garage conducted by Ayers. Hanson drove up in an automobile and gave Ayers some shoes; he told Ayers to take them inside, see if he had some way of disposing of them. Hanson said he wanted some tires changed; told Ayers he wanted some numbers on some tires changed; take the number off one tire and put it on another; vulcanize them on. He said the tires came out of a Northern Pacific train; he said they were stolen goods.

I know this defendant Trepanier; at one time he was a member of my crew running between Auburn and Ellensburg. I set a train out at Lester, between Auburn and Ellensburg; Lester is about forty-two miles east of Auburn, on the west

(Testimony of Clifford W. Scott.)

side of the Cascades. I set a train out and went back to Ellensburg with the engine; I was away from the train about seventeen hours; when I left the cars they were in good condition, and when I returned, one had been broken open and pilfered; in the door of the car there were a couple of electric drills; Trepanier stole one of them and I stole the other.

I have known Fowler about a year. On March 17th I met him. About March 17th of this year I met him on the main street in Auburn. I asked him if he had some tires he wanted to get rid of and he said he did; he wanted to know if I had a place to get rid of them; I told him I did; he wanted to know how much he could get for them, and I told him I didn't know. He went and got a price list and we talked about the price list; we separated, and afterwards met Mr. Ayers, and I had no further conversation with him that I know of.

I had a conversation with Mrs. Lewis; she runs the St. Elmo Hotel at Auburn; this hotel is patronized by railroad men. I had the conversation about January 1st, this year, in her apartment at the St. Elmo Hotel. She said she had some silver that she had got from a trainman that had been taken out of the trains, out of box-cars. [92]

Cross-examination by Mr. DORE.

About the fall of 1918 I stole the air-drill, and Trepanier stole another. The stealing of these air-drills from the train at Lester was just a little pri-

(Testimony of Clifford W. Scott.)

vate agreement between Trepanier and myself. No other defendant in this case had anything to do with it. I do not know who broke the seal on the car. It was broken when Trepanier and I found it. Hanson was not a member of the crew at the time the drills were stolen. I loaned the drill I stole to a fellow, and I never got it back. The only person I was ever on a thieving expedition with was Trepanier. I am still in the employ of the railroad.

I am acquainted with Ayers. I was arrested in Bellingham; I was convicted of having a wrong automobile license. After Fowler told me about the tires, I approached Ayers; I believe it was Saturday afternoon; I was not working as a detective. I approached Ayers in good faith; I knew Ayers could get rid of stolen property. George Colby was in the garage at Auburn when I heard the conversation between Ayers and Hanson.

Redirect Examination by Mr. SAUNDERS.

Hanson wanted at one time the tires taken off the rear wheels and put in front, and *vice versa*, and another time he wanted the numbers of the tires changed, vulcanized around.

Testimony of George M. Payne, for the Government.

Direct Examination.

I am one of the special agents of the Northern Pacific, living in Seattle and working along the Western Division, and have been such special agent for about fourteen years. I was in Edwards' gar-

(Testimony of George M. Payne.)

age all day on the 27th of March last. On the 25th of March Mr. Hughes, the deputy sheriff, and I drove from Renton and saw Mr. Edwards and arranged with him for the use of his garage. On the night of the 27th I was at the garage, together with Winquist, Hughes, Mr. Ramage, Mr. Lovell and Mr. Campbell. I was not there when the auto arrived with the goods. I had been gone four or five hours. Winquist inventoried the merchandise that was brought to the garage. I saw Ratcliff and Fowler the day after they were [93] arrested. I know Ayers; he was working for me.

Cross-examination by Mr. DORE.

Ayers had been in my employ about six months; he was paid by special voucher, \$150.00 a month and expenses; his salary and expenses amounted to about \$350.00. I did not buy the garage for Ayers, at Auburn; I had no interest in it; he owned it himself as far as I know.

Testimony of John Winquist, for the Government.

Direct Examination.

I am a special agent of the Northern Pacific Railroad Company. I have been a special agent for three years. On February 17th last I visited the home of Creed Lane, accompanied by Deputy Sheriffs Lovell, Connors, Brown, Ramage, George Payne, special agent. We found general merchandise of every description, such as clothing, lining, satin in bolts, cigarettes, overalls, tobacco. I have a list of the things found at Creed Lane's place.

(Testimony of John Winquist.)

All these things, except these tires and this gun. I have in the pile here all of the goods found at Creed Lane's place.

Goods are here offered in evidence as Government Exhibit 10.

I visited the home of T. E. Jones on March 19th last in Auburn, and was accompanied by Marshal Toby and George Payne, special agent. We got some tools marked "N. P. Railway Company" and some tablecloths marked "G. N. Railway." That is all I personally found at the time. There were some other goods found, but I cannot remember what they were.

I visited the home of Bellamy on March 19th last, accompanied by Deputy Marshal Ed. Toby I found one brand new overcoat hidden under a mattress on the springs of a davenport, a couch. We got two boxes of Roi Tan cigars hidden in a drawer of the buffet. I can identify the overcoat.

Overcoat admitted as Government's Exhibit 11.
[94]

On April 12th last, in company with Deputy Marshal Ed Toby I visited the place of business of defendant Thomas Singer, in Seattle, and we found one overcoat and two suits of clothing.

Overcoat and two suits of clothing were received and admitted in evidence and marked Government's Exhibit 12, 12A and 12B, respectively.

Cross-examination by Mr. GORDON (Mr.
TUCKER.)

On March 26th we arrested Thomas E. Jones.

(Testimony of John Winkvist.)

Thomas Singer's place of business is #314 Denny Building, Seattle Washington; he conducts a hair-dressing business; it is up on the third floor, and occupies a space probably sixty feet in length. I found the overcoat hanging in the main office, on a clothes-rack. Mr. Toby found the two suits of clothing. I was not present at the time he found them; I was in another room; they were wrapped up in paper.

In Bellamy's house there was also a hair-brush of the Pullman Company. I understood that at the time of the search of Bellamy's house, Bellamy was in California; he was arrested in Los Angeles; at the time of the search he had been gone from the State about one and a half months.

Redirect Examination (Mr. CONWAY).

Bellamy's house is at 111 Brandon Street, Auburn.

Testimony of George M. Payne, for the Government.

I visited the Northern Pacific Caboose #1859, and made a search of it on March 26th last. I was accompanied by J. R. Young; at that time the caboose was in charge of Conductor Thomas E. Jones. I found in one locker some cutlery marked "Russell Cutlery Company," bone-handled steak knives, a butcher's steel; we found some clothing with the tags removed, a brand new suit; and an overseas bag marked with the name of the defendant Bourdell, in the locker where the cutlery was found. We found coffee, several cans of coffee and some coffee in bulk, in a two-quart jar. It was

(Testimony of George M. Payne.)

Hill Bros. coffee in cans, if I remember right. We found shoes with identification marks destroyed. We found tools which belong [95] in the car, such as are supplied to the caboose for use on the road. The goods were found in the lockers securely locked with Yale locks, secured by staples. We opened those three on the inside of the car.

The record shows that Bourdell was employed on the train at that time; here is the time-book, a copy of the time-slips that are turned in by Mr. Jones. That is the record regularly kept by the conductors of such trains. The train crew of the train of which this caboose was a part at the time the search was made was composed of T. E. Jones, Louis Trepanier, W. F. Garrison and Edward Bourdell. All the stuff that lies there on the floor is stuff that was found in the caboose.

The articles were received in evidence and marked Plaintiff's Exhibit 13.

I visited the St. Elmo Hotel on the 30th day of March, accompanied by Deputy Sheriffs Lovell and Ramage, and Mr. Bush of the Northern Pacific. In the kitchen of the St. Elmo Hotel, among some silverware, I found six identical steak knives marked "Russell Cutlery Company," which are identical with the ones found in the caboose. One of the knives had a little grease on it; they were in the kitchen, of the St. Elmo Hotel, on the dining-table.

Six knives offered in evidence received and marked Plaintiff's Exhibit 14.

I had a conversation with Mrs. Lewis and asked

(Testimony of George M. Payne.)

her where the knives came from and she said that she found them in a room vacated by two transients.

Cross-examination by Mr. GORDON.

I only found that one time-book in the caboose. I do not know of my own knowledge whether the entries in the book are correct or not.

The lockers from which the goods were taken in the caboose were part of the train equipment; we found the goods in two different lockers; there were two large lockers on one side of the caboose, and I believe there was a small locker where the canned goods or eatables were. [96] There was nothing to indicate to which man the locker belonged. We found the clothing and part of the goods in one locker; the time-book was in the locker that we found the clothing in, and the cutlery was in a locker where the overseas bag was; we found some goods in different parts of the caboose. I do not know of my own knowledge when the caboose got into the yard, and I do not know of my own personal knowledge how long the caboose had been in the yard before it was searched. Some of the train crews do cooking in the caboose.

Redirect Examination (Mr. CONWAY).

The overseas bag looks the same as when I found it. Everything now in the bag was in it when I found it in the caboose.

Testimony of J. C. Connor, for the Government.

Direct Examination.

I am a deputy sheriff of King County, Washington, and have been for two and a half years. I visited the Lloyds Hotel in Auburn on the 26th of February last, accompanied by Deputy Sheriffs Lovell and Ramage and Irving Brown. The lady we talked to at the Lloyds Hotel said her name was Jones. We searched the room occupied by the landlady, and the front room. As near as I can remember, in a part of the house occupied by the landlady there was two suitcases found; and we found some shoes, coffee, two or three fruit ars and some other stuff there. I am not positive that I could identify the grip.

Testimony of N. L. Lovell, for the Government.

Direct Examination.

I paid a visit to the Lloyds Hotel on February 26th last, accompanied by Deputy Sheriffs Connor, Irving Brown and Earl Ramage. I had a search-warrant which called for a search of the premises of the defendant Bourdell at the Lloyd Hotel. I found in the landlady's room, the office part, two grips. I am sure that is the grip which I found in the landlady's room. I think the razor strops were in another room; I think the shoes also were in another room. Mr. Payne made endorsements on the tags. I cannot testify that the [97] razor strops were found in the same room or in this grip. The padlock, neckties and bottles were in a trunk

(Testimony of N. L. Lovell.)

in another room; the shirts were in the leather grip. I saw the other grip first in the landlady's room; the shoes were in the grip; those hats was found in a trunk, but I won't be sure, but I think it was Room 31, in the front of the building, along with the razor strops. The shirts were with the hats in Room 31; the bedspreads were in the landlady's room in the suitcase.

The lady that said she was the landlady said her husband had been in the shoe business, had a store or something, and that was something she had left over when he went out of business, or something to that effect. She claimed that one of those grips belonged to another party—White, I believe the name was.

Cross-examination.

I won't say positively that the shirts was in the suitcase. I think they were in Room 31. The cans of coffee were in the suitcase. I believe that is all I could positively identify.

Copy of search-warrant marked for identification as Defendant Bourdell's Exhibit "A."

Testimony of Irving Brown, for the Government.

My name is Irving Brown, and I visited the Lloyd Hotel at Auburn on February 26th last. I went into Mrs. Jones' room. I searched the dresser and bureau drawers, and found a large quantity of bolted drygoods; she said they formerly belonged to her husband, who had a store at Auburn. The only thing I took out of the dresser was a pair of

(Testimony of Irving Brown.)

brown ladies' shoes; there was two jars of jam in the grip, which had been broken. The grip was right as you come in the door, on the left-hand side, underneath the cupboard. There was a bed in the room and a dresser, and it was a living-room, cooking-stove and all. She said she obtained all the goods from her husband's store in Auburn about two years previous. She said her husband had given her the shoes. The shirts were in the leather suitcase. There were two cans of coffee and two jars of jam and a couple of pairs of shoes in one of the grips, and the other grip contained the rest of the stuff. I just opened it and asked her who the stuff belonged to. [98] She said she didn't know, they were left there by some roomer.. I asked her if she knew who the roomer was and she said she did not. I asked who the party was that had the name on the label, and she said she did not know who it was. The men's shoes were found in the room, I believe, of Mr. White and Bourdell; the razor strops and neckties were found in White's and Bourdell's room.

Suitcases received in evidence and marked Plaintiff's Exhibit 16.

Redirect Examination.

I went to Bellamy's house on the 26th of February; we found so much stuff that it would take a diary to keep a record of it; overalls we found in various cupboards; then we found some socks, two different brands, and some white engineer's linen caps, or coal caps, whatever you call them.

(Testimony of Irving Brown.)

I can identify this bundle of overalls. The socks were found in a trunk upstairs. I believe probably one of the other deputies found the shoes. I am sure it was in Bellamy's house where we found all this stuff.

Cross-examination.

I went to Bellamy's house on the 26th of February; I don't know, it was February or March. Mr. Connor had a search-warrant. I found the socks and caps and combs and the pair of shoes upstairs in a trunk in the attic. Bellamy was not there, but we saw Mrs. Bellamy. There was no lady at the house who claimed to me that she was Mrs. Bellamy.

Further Examination by the Government.

I visited the house of Creed Lane on the 17th of February last. As far as I remember we found a lot of overcoats, a lot of overalls; there was two hand-bags that I found myself, off in a little room used for preserves; there was a lot of jam and canned milk around there; I found two black hand-grips and they contained overalls and shoes; there was also a gun found in the house, a boy's suit, a lot of dry bolted goods and phonograph records.

I can identify the boy's suit, the bolted goods, the two black grips and the shoes; they seemed to be everywhere,—under the beds, in cupboards and on top. [99]

Testimony of Mrs. Muza Ratcliff, for the Government.

I am the wife of the witness Ratcliff; I have been married eleven years; I have been living in Auburn four years. Engineer Forner lived next door; he was in the employ of the Northern Pacific; we are living in his house, 103, now. On March 27th last the defendant Hanson came to my house; he came three times that evening; the first time he asked for my husband; I told him he was not at home; he came back the second time about twenty minutes after and my husband had not returned; he told me that Mr. Ratcliff and he were going out to get some shoes; I told him it was too late; that I didn't think Mr. Ratcliff [100] would go. He came back the third time, between eight and nine, and met Mr. Ratcliff as he drove into the alley just at the gate, and they came into the house together, and Mr. Ratcliff said he was going with him and Hanson waited in the kitchen and talked to me. Mrs. Hanson sat out in the car. Mr. Ratcliff went and changed his clothes and went with him. Mr. Hanson said he had a sale for the shoes and they would make about two hundred and fifty dollars on the deal. I asked Mr. Ratcliff not to go, and he said, "I will go, but this will be the last time." I asked him why he would do such things, with Hanson; I asked if it was because the way—that Hanson had a car that he would do those things. I did not see my husband again that night. When I saw him again it was in the County Jail Monday morning.

(Testimony of Mrs. Muza Ratcliff.)

Mr. Hanson brought some matting to our house in his car about daybreak, about the first or third of March. Both rolls were brought to our house by the defendant Hanson about three o'clock in the morning. I was getting my husband's breakfast and he told me he expected Hanson; if I heard him toot the horn to tell him. About daybreak Hanson came through the alley and tooted the horn and Mr. Ratcliff went out; I lit the light on the porch and I saw Mr. Hanson put the two rolls of matting into the side of the yard; Mr. Ratcliff brought the matting into the house.

No cross-examination.

Redirect Examination.

I know Mrs. J. A. Lewis. I had a conversation with her. I went to her house four different times after Mr. Ratcliff's arrest. The first two times I did not find her at home. I called on her to find out what she might know about Mr. Ratcliff's arrest, and she told me that Mr. Ratcliff called there that night between twelve and one, and asked for Slim. That was Saturday night, March 27th. She said Mr. Ratcliff went there and told her he wanted to see Fowler; that he had a deal on with a man for shoes, and she asked Mr. Ratcliff if he knew the man he had the deal with, and he said he didn't know him, but he thought he was all right; she told me if she had looked out of the window and seen who the man was, she would have known he was not all right. [101] I went to see Mrs. Lewis about the first of the following month to see about

(Testimony of Mrs. Muza Ratcliff.)

getting Mr. Ratcliff's bond, and she told me that Mr. Ratcliff had squealed; and that she had seventy-five hundred dollars up now, and she would not have anything to do with Ratcliff; that Ratcliff had squealed on the bunch. She told me not to be angry with her, or the bunch, that he had squealed, and they were going to frame up against him, and that he would get ten years, and for me not to be angry with them after this trial.

Cross-examination.

The second time I went to see Mrs. Lewis was about May 1st. She told me he had come there and asked for Fowler. I roomed at the St. Elmo Hotel four years ago. I have never had any trouble with Mrs. Lewis. I went to Mrs. Lewis and asked her if it was a fact, while I was a guest at the hotel, my husband, with another woman named Ratcliff, lived at the hotel. Mrs. Lewis asked me if my husband was supporting me. I said yes. She said if Mr. Ratcliff was supporting me and I had a family, I had better forget it, the story of him living with another woman in her hotel. I found that Mrs. Lewis told the truth. I did not go back and tell Mrs. Lewis she had lied about me. Mrs. Lewis did not admit that she had lied to me. I did not go to Mrs. Lewis and say to her, "You own a big hotel, you have a lot of money, you have influence with the bankers here, and they have influence with Mr. Heister; you go to him and get him to drop this matter about finding stolen prop-

(Testimony of Mrs. Muza Ratcliff.)

erty." I never was in Mrs. Lewis' from the first time until this other time.

I don't remember speaking to Mrs. Lewis about diamonds stolen from the Auburn postoffice. The postmaster gave my little boy a package; it was on a Saturday night. I don't know whether it was a registered or insured package, but it was either—Mr. Payne, the postmaster, told me afterwards—and I gave him money to buy some stamps, and mail a letter; the child is only eight years old. He put the package down behind him on the desk and stamped the letters, and when he turned around the package was gone. He came home and I went [102] back with him, and we couldn't find the package. Monday morning Mr. Ratcliff and I went down to the postoffice to inquire if the package had been left in the window. I didn't know they were diamonds. That was the investigation that the postoffice authorities were *carry* on that I told Mrs. Lewis about. I went to Mr. Payne, the postmaster at that time, and told him that maybe it was some package of mine that was lost; then Mr. Payne told me it was a very valuable package that was lost, that it didn't belong to me, and must have belonged to that other Ratcliff; that it was diamonds valued at a thousand dollars. I did not tell Mrs. Lewis that I had schooled the boy to say his name was Hall. I went to her house because I wanted to know why my husband was arrested. I heard Fowler was arrested with my husband at the time, and I knew she would know of Fowler, because he

(Testimony of Mrs. Muza Ratcliff.)

was living in her house; she told me they were all arrested on conspiracy. She told me that if she had looked out of the window and found my husband was with a thief like Ayers, she would have warned him. I did not go to Mrs. Lewis and tell her my husband was in trouble because he had torn the American flag off the engine in Everett during the war. I did not know my husband got a letter from Judge Lawrence. I was not angry with Mrs. Lewis for refusing to go my husband's bail.

Testimony of J. M. Clark, for the Government.

Direct Examination.

My name is J. M. Clark. I am in business here with Thomas Singer, Incorporated. We are partners and have been since the 20th of August last year. We conduct a hair goods and beauty parlor. Some time in February I had a conversation with Singer about these goods. On that date Bourdell was in the store. Bourdell wears a toupee. On that date Singer called me into the office and Bourdell and he were there, and they had some shoes there. Singer insisted on me trying on some shoes. I said I didn't want any shoes, and he says, "Try these on and see if they fit you"; so I tried on one shoe. Of course, it did not fit—I knew that before I started. Singer asked Bourdell if he thought he [103] could get some others to fit, and Bourdell said he did not know, or wasn't sure, or something to that effect. I could not say for certain what Bourdell's answer was; I did not pay much atten-

(Testimony of J. M. Clark.)

tion. Later in the day, when Bourdell had gone out, I asked Mr. Singer when Bourdell was going to pay *that* this toupee of his. The price was thirty-five dollars. Singer said he had already paid for it. I said, "How do you figure that? I have no records of it having been paid for." Singer said, "Well I got an overcoat from him." I said, "You cannot collect anything of that kind." He said, "I have the overcoat from him. I said, "That is a funny way of straightening up a firm's account." He said, "You had a chance to have a pair of shoes and you turned it down; that is your fault." I said, "Who is this fellow Bourdell, anyway—who is he and what is he?" Singer told me he was a freight clerk in the railroad. I says, "How does he come to be peddling this stuff?" He says, "Well, he is no worse than the rest of them. All these railroad men, they get all kinds of stuff that they want; they can get it."

About two weeks later Bourdell came into the office one morning with a package wrapped up in newspaper. He asked me if Mr. Singer was in, and I told him no; it was then just a few minutes after nine o'clock. He asked me when he would be in and I said I didn't know; he was rather irregular; he might be in in five minutes and it might be an hour. So he left the package and went out. I saw Bourdell again that day. He went into the men's booth and opened up the package. The next time I saw Bourdell was on the street. On the night we came back from Commissioner McClel-

(Testimony of J. M. Clark.)

land's office, Singer told me that I did not see him putting the suit away, and that if I had kept out of this there would be nothing to it; that I had cooked his goose.

Cross-examination.

Singer took the clothes out of the newspaper and wrapped them up in plain paper; he took them back to the back of the shop and put them in an empty box; he put an empty box over that box. Bourdell was in the habit of coming in to get his hair cut; it is the habit of fellows we make wigs for to come up there and get their hair cut. I paid Tom Singer \$6,000 for a half interest in the business. [104]

Redirect Examination.

Tom Singer showed me the overcoat the day he got it. He said *it* got it at Hart, Schaffner & Marx.

Recross-examination.

I did not know at that time that he got it from Bourdell. He did not tell me at that time that he got it from Bourdell. He told me later that he got the coat and that I could not collect for the toupee.

Recross-examination.

Tom Singer did not tell me at the time where he got the overcoat.

Testimony of Mrs. E. B. Penny, for the Government.

My name is Mrs. E. B. Penny. I have been working about a year in Thomas H. Singer & Com-

(Testimony of Mrs. E. B. Penny.)

pany's place of business, as a hair-dresser. I have seen Mr. Bourdell in Singer & Company's place of business, #305 Denny Building. There was only once he brought in a package; it was wrapped up. He asked for Mr. Singer. Mr. Singer had an overcoat on and he came out and we all commented on it. We did not think it fit him across the shoulders. I told him he had better take it back to his tailor and have it fixed right. I asked him if that was the tailor, and he said no, Bourdell was his friend.

Cross-examination.

Mr. Bourdell went into the office and talked with Mr. Singer. Mr. Bourdell had a package with him. Mr. Singer told us that he had a new overcoat.

Exhibit 12 does not look like the coat. I do not think that Mr. Singer and Mr. Clark get along any too well. Mr. Singer never told me on any occasion that he had got the coat from Bourdell.

Testimony of I. B. Armstrong, for the Government.

My name is I. B. Armstrong. I have the Buster Brown Shoe Store here. The first time I saw Mr. Bourdell was five or six months ago. Mr. Singer came into my store several months ago, seven or eight months ago, with a view of renting [105] a portion of the store. He said he would like a chance of renting that when it was vacant; a little later I told Mr. Singer I thought the store would be vacant, and he looked it over, and he said he did not think he could use it, it was too small. Then he said, "Could you use some shoes if you could

(Testimony of I. B. Armstrong.)

get them cheap?" I said I didn't know. I would have to see them. He said, "I will have a man bring in some samples and you can look them over."

Several months after that, almost two months, they came in one morning with some samples of shoes. I looked them over and said that I could not use them; I handle the White House shoes. This man asked if I could get some White House shoes, could I use some of them, and I said I didn't know, to bring them in and I would look them over. They went out and I never saw them again. The White House brand is made in St. Louis, a man's shoe.

Cross-examination.

I do not know where Tom Singer got the shoes. Mr. Bourdell was not with Mr. Singer at the time Singer asked if I could use some shoes if I got them cheap. I had not seen Bourdell up to that time. Bourdell and Singer came into our store four or five months ago.

Testimony of John Winkvist, for the Government (Recalled.)

I went to Bellamy's house on March 19th last. I found letters, canceled checks and receipts for rent, if I remember right, signed by Mr. and Mrs. Bellamy; the letters were addressed to the Bellamys; some of the checks were signed by Mrs. Bellamy and the receipts were to Mr. and Mrs. Bellamy. The number of their house is 111 South Brannon Street, Auburn.

(Testimony of John Winquist.)

Cross-examination.

I do not know who wrote the letters and receipts.

The COURT.—In making an objection for one defendant, any defendant may have the benefit of it unless otherwise indicated. [106]

Redirect Examination.

I had a conversation with Thomas Singer on the 12th of April. Mr. Tobey showed the search-warrant; I went over to the rack, took the overcoat and asked if it belonged to him and he said yes. That is Government Exhibit 12. He said he got it at Hart, Schaffner & Marx Store on Second Avenue—Parger & Co. Then I took the coat and went down to the store for identification.

Cross-examination.

Mr. Singer said he bought it there three or four months prior to the date of his arrest.

Testimony of E. R. Tobey, for the Government.

I went with Mr. Winquist on March 19th to a certain house in Auburn, in my capacity as United States deputy marshal.

Witness excused to be recalled later.

**Testimony of John Winquist, for the Government
(Recalled).**

I did not know Bellamy personally at the time I searched his house. I did not know his handwriting. [107]

The following facts were proved by competent testimony and no objection was made to the intro-

(Testimony of John Winquist.)

duction of said testimony, except as hereinafter specifically may appear:

74 bundles, consisting of 294 tires, were shipped January 3d, 1920, by railroad, in Interstate Commerce, from Seattle, Washington, by B. F. Goodrich Rubber Tire Co., to Archer & Wiggins, Portland, Ore. 58 tires were found short upon checking at Auburn Transfer. Auburn is in King County, Washington; 13 of these tires were in defendant Fowler's automobile at Renton, at the time of Fowler's arrest.

A shipment of overcoats was made by railroad in Interstate Commerce, from Chicago, Illinois, to Seattle, Washington. Upon arrival the total shipment was found short. Five of these overcoats were found in the house of defendant Creed Lane, one in the possession of defendant Bellamy, and one in the store of Tom Singer. The train crew that handled the car the goods were shipped in from Ellensburg to Auburn June 25th, and consisted of Conductor Thomas Jones, Creed Lane and Ed. Bourdell.

Eight shotguns shipped by railroad in Interstate Commerce, by Shapleigh Hardware Co., St. Louis, Missouri, to Hostetter & Co., Tacoma, Washington. None were received. One of the eight guns was found in the possession of Creed Lane. The train in which the guns were shipped was hauled from Ellensburg to Auburn, July 30th, 1919, by T. E. Jones and Brakeman Creed Lane as members of the crew.

Fifteen cases of shoes were shipped by railroad in Interstate Commerce, by H. C. Goodwin & Co., Columbus, Ohio, to Shaw's Department Store, Buckley, Washington. Shipment found short sixteen pairs. Shoes found in the possession of Mrs. Sarah Jones had same stock number as these shoes. Defendant Bourdell was a member of the crew that hauled this car from Ellensburg to Auburn.

Four cases of shoes were shipped by railroad in Interstate Commerce by Peters Shoe Company, at St. Louis, Missouri, to J. H. Taylor & Co., of Seattle, Washington, February 28th, 1920. Entire shipment short. David Jones, C. H. Goldman, H. W. Hanson and William Ratcliff were members of the crew which hauled the train in which the shoes were contained, from Ellensburg to Auburn. The shoes were [108] found in the possession of Ratcliff at Renton.

Box of razor strops shipped by railroad in Interstate Commerce by Koken Barber Supply Co., St. Louis, Missouri, to Schwabacher Hardware Company, Seattle, Washington. One and a half dozen short. Strops found in room of George E. White and Ed Bourdell identified as part of shipment. Defendant G. E. White was a member of the crew that hauled the car in which the razor strops were shipped from Ellensburg to Auburn, January 21st, 1920.

Three cases of shoes shipped by railroad in Interstate Commerce from F. M. Hoyt Shoe Co., Manchester, New Hampshire, to Moehring Shoe Co., Snohomish, Washington. Two dozen pairs short

on arrival. Train handled by T. E. Jones and H. W. Hanson, brakemen. Shoes were of the same kind as found in the grip of G. E. White.

Shipment of case of hosiery from St. Paul, Minnesota, to Seattle, Washington, by railroad, in Interstate Commerce. Thirteen dozen short on arrival. Fourteen pairs of similar hose found in the home of Creed Lane, and fourteen pairs in the home of C. H. Bellamy.

Four rolls of matting shipped from Hong Kong, China, via Seattle, Washington, by railroad, in Interstate Commerce, to St. Paul, Minnesota. Defendant Ratcliff testified that the matting was stolen by himself, H. W. Hanson and David Jones at Eaton, Washington.

Case of cutlery shipped by railroad in Interstate Commerce, by Russell Cutlery Co., Turners Falls, Mass., to Seattle, Washington. One package in the order short. In a caboose #1859, cutlery found identified as part of the shipment; similar cutlery was identified as being found in the Hotel of Mrs. H. A. Lewis. The train that hauled the cutlery was handled by T. Jones, as conductor, and E. Trepanier and Ed. Bourdell.

From a copy of the constitution of the Order of Brotherhood of Railroad Trainmen, the following clause was read into the record: [109]

“Whenever the General Secretary and Treasurer shall be satisfied that any member of the Brotherhood of Railroad Trainmen has been acting as an informer, spotter, spy, or other operative for any detective agency, railroad company, or other per-

son or persons, partnership or corporation, which act is or was detrimental and opposed to the best interests of the members of the Brotherhood itself, he shall immediately enter an order, authority for which is hereby given, to suspend such member from membership, and shall cause the entry to be made on the Grand Register opposite the member's name to that effect." [110]

Testimony of George Payne, for the Government.

I visited Room 31, Lloyd's Hotel, Auburn, first on the 26th of February last. I found a pair of shoes in Bourdell's room. I found letters addressed to George E. White. I did not take any of them; found them in a bureau drawer in Room 31. Also some letters in a trunk, railroad receipts to George E. White.

Cross-examination.

The Court refuses to strike testimony of witness on direct examination.

Redirect Examination.

Bellamy's house is 111 South Brannon Street, Auburn.

**Testimony of E. R. Tobey, for the Government
(Recalled).**

I arrested Bellamy on March 19th last coming out of the Lloyd's Hotel in Auburn. I visited Room 31. Bourdell was registered for that room. I went to Bourdell's room on the 19th of March. Bourdell admitted it was his room. I visited the house, 111 South Brannon Street, on the 19th day

(Testimony of E. R. Tobey.)

of March, with Mr. Winquist, special agent for the Northern Pacific.

I saw Tom Singer on the day of his arrest. I went to #304 Denny Building, and served him with a copy of the warrant; we proceeded to search the premises and found an overcoat and two suits of clothes. The overcoat he said he bought three or four months previous at Hart, Schaffner & Marx, in Seattle.

Testimony of Wilfred Failor, for the Government.

Direct Examination.

I am employed as a caller at the Auburn Yard Office of the Northern Pacific Railway Company; I have been so employed since the first of February this year. I know the defendant Bellamy resides in Auburn, at 111 South Brannon Street. I visited the place once or twice. I remember calling him once; he came through the door; he answered by the name of Bellamy. I was sent to call him for a train crew. I rapped at the door and asked if it was Bellamy and he said "Yes." I visited it the other night for the purpose of ascertaining the number. [111] The last time I called Bourdell he was rooming in the Lloyd Hotel. I think it was Room #4.

Cross-examination.

I have no idea when I called Bellamy. It was during the month of February, 1920. I don't know Bellamy personally. I called him before February 18th.

Testimony of Wilfred Failor, for the Government.

Direct Examination.

Since yesterday I visited the house of one Belamy. The number is 111. [112]

**Testimony of William Ratcliff, for the Government
(Recalled).**

Direct Examination.

Coming west on March 15th, at 11 A. M. one of my brakemen was H. W. Hanson, and I stopped the train at Maywood. Hanson went into the bush and got an automobile tire; it was a small tire. I asked him where he got the tire and he said he had some tires over there. He said he was going to sell them. He said he was going to put the tire he got that day on his car. Hanson, to my personal knowledge, had a car.

Testimony of C. J. Bush, for the Government.

Direct Examination.

J. R. Young, Chief Watchman at the Auburn yards, and myself went up on the railroad track, towards the east to look for tires; we did not find any the first time because there was too much snow on the ground. The second time we found them at Maywood, a flag station, about 150 feet from the right of way. They were cached behind an old windfall log, covered over with leaves. Eleven of those tires there are the ones we found. We had the dispatcher stop No. 3 passenger train west-

(Testimony of C. J. Bush.)

bound, and loaded them into the baggage-car and came to Seattle. We found those tires after the arrest of Hanson, Fowler and Ratcliff. [113]

Testimony of J. R. Young, for the Government.

Direct Examination.

I am a special watchman for the Northern Pacific Railway Co. I went up with Mr. Bush, along the track, east of Auburn, to look for tires. It was on April 10th. We were up there two or three times. The first time there was too much snow. They were cached back, about fifty or sixty feet from the railroad. That is the stack of tires we found; there are twelve of them.

Tires offered in evidence as Government's Exhibit 28.

Testimony of Roy Ayers, for the Government.

Direct Examination.

I was at the house of the defendant Hanson in Auburn a few days before the 27th of March, between one and three in the afternoon. Mr. and Mrs. Hanson were there and some old gentleman; I don't remember his name. The date was between the 24th and the 27th of March. Hanson gave me a list of goods that he had or could get for me, and I took my note-book out of my pocket and made a memorandum of the goods he had or could get for me at that time. Hanson called the articles off he had for sale and I wrote them down in his presence,

(Testimony of Roy Ayers.)

and then I read them back and asked him if that was all he had or could get for me.

Government's Exhibit 29—page of the book—admitted in evidence. The pages read as follows: "1000 pounds of block tin; 192 pairs of ladies' shoes at \$2.00 a pair; 60 pairs of children's shoes at \$2.00 a pair; 36 tires at \$10.00 each. 30 cartons of cigarettes at \$40.00."

The old man was making whisky while we were there, he was at the stove while we were at the table.

Cross-examination.

I was convicted of a crime in Dawson, Yukon Territory. I don't know the name of the felony. I was not convicted in California of any crime. I was tried in Los Angeles County and acquitted. I am not a fugitive from justice from Los Angeles County. [114]

Testimony of E. R. Tobey, for the Government (Recalled).

Direct Examination.

I first saw Government's Exhibit 11, at #111 South Brannon Street, Auburn, Washington. It was under the mattress in a Newfold Davenport. The gray suit of clothes, Government's Exhibit 12, I saw in the hair-store of Tom Singer, 304 Denny Bldg. Exhibit 12A, I also saw in Singer's store. I had a conversation with Singer about both the overcoat and the two suits of clothes. He said he bought the overcoat at M. Prager & Co. three or four months previous to the time we seized it. About the suits,

(Testimony of E. R. Tobey.)

he said they were left there by a man who would call for them later. He said he did not know who he was; a man came there and wanted to leave the package there; he did not know what was in the package. The stuff in the gunny-sack, these are two Great Northern tablecloths. I found them in the home of Tom Jones.

**Testimony of Irving Brown, for the Government
(Recalled).**

Direct Examination.

I made a search of certain parts of the Lloyd Hotel in Auburn, on the 26th of February last. Government's Exhibits 16 and 16A are the two grips I found there. I searched the room and found a trunk broken open. We got some razor strops out of there; looked through some letters and envelopes and saw the name of Bourdell. We took the razor strops from the trunk; there was a lot of mail, and a railway card with a name on it, the name of Bourdell. In the drawers we found some Jergensen's Lotion and the ties.

I desire to correct my former statement in regard to the razor strops; we found two of the razor strops in a suitcase there, the leather one marked 16A; three or four in a trunk and two in the dresser drawer of the other room—that was Bourdell's and White's room. The yellow tag was on the bottom of Exhibit 16A when we first saw the grip. The shoes were in the suitcase. The bedspreads are Government's Exhibit 16X.

(Testimony of Irving Brown.)

Bedspreads referred to received in evidence and marked Government's Exhibit 16X. [115]

Redirect Examination.

The suitcase marked Exhibit 16A has White's name on the bottom of it.

Recross-examination.

It is E. White, Sumas. Shipped from Camp Grant, Issinois, to Sumas.

**Testimony of E. R. Tobey, for the Government
(Recalled).**

Direct Examination.

Gunny-sack and contents offered in evidence as Government's Exhibit 41.

I was informed that at the time we searched Bellamy's house, he was in California. I arrested George E. White in the Parks Hotel. Searched his room and found nothing in it. I arrested Dave Jones in Auburn.

**Testimony of Irving Brown, for the Government
(Recalled).**

Direct Examination.

I found a pair of shoes like Government's Exhibit 42 in a trunk; I found a pair of shoes exactly like this in the trunk of Bruce Paris, in the attic of the home of Mrs. Bellamy.

Shoes admitted in evidence as Government's Exhibit No. 42.

**Testimony of N. L. Lovell, for the Government
(Recalled).**

Direct Examination.

I made a search of the house #111 South Brannon Street. There was a pair of shoes found in a trunk in Bellamy's house. Government's Exhibit 17 was found in a trunk at the same address. Exhibits 17A and 17C were found in the same house. The package of overalls was found in Paris' trunk upstairs. Pair of Educator shoes were found in Paris' trunk; I also found a union card there with his name on it. [116]

**Testimony of John Winqvist, for the Government
(Recalled).**

Direct Examination.

Government's Exhibit 41 is marked Great Northern Railway Company,—tablecloths belonging to the Great Northern. Here are four cold chisels and one wrench, pipe wrench, a combination wrench, that are stamped N. P. R., that is the property of the Northern Pacific Railroad. The Northern Pacific Railroad is a common carrier and has been since January 1st, 1918.

Further Direct Examination.

I have been a special agent for the Northern Pacific Railroad for about three years. During that time I have had occasion to investigate pilferages from railway cars.

Q. From your performance of these duties as special agent, have you learned the methods whereby

(Testimony of John Winquist.)

goods are and may be stolen from sealed cars, without breaking of the seals?

Mr. DORE.—I object to that as incompetent, irrelevant and immaterial.

The COURT.—It is preliminary; it is overruled.

A. Yes, sir.

Q. Please explain to the jury.

Mr. DORE.—I object to that as incompetent, irrelevant and immaterial, the methods by which cars may be broken into without breaking the seals.

The COURT.—Objection overruled.

Mr. DORE.—We desire an exception.

The COURT.—Allowed.

A. At the bottom of the side door of a car are lugs that hold the door in place. These lugs are held there by bolts screwed through the beam of the car. The nuts on the inside can be taken off, the bolts taken out, the lugs removed, and the door swung out so a man can enter. [117]

Q. Without breaking the seal?

A. Without breaking the seal.

Q. Can the door be fixed up in its former condition to look just like it did before?

A. Yes, sir, everything can be replaced.

Q. Are there other methods whereby cars can be pilfered?

Mr. DORE.—I object to that as incompetent, irrelevant and immaterial, and not within the issue.

The COURT.—Objection overruled. That is, without breaking the seal?

Mr. CONWAY.—Yes.

(Testimony of John Winquist.)

Mr. DORE.—We desire an exception.

A. No, that is the only thing I know of right now.

Motion for a directed verdict for Joe Vargus on all three counts.

Motion granted. Defendant Joe Vargus discharged. [118]

Direct Examination.

I recognize pile of pig tin, here marked Government's Exhibit 43. I dug it out of the N. P. right of way at Auburn, Washington, March 11, 1920. I found the bars hidden in different places close to the ice-house of the Auburn yards. We had a car pilfered two days prior to that date, and I started searching for more pig tin, which resulted in finding those twenty-three bars. I found them in several places, on March 11th. I am advised the value is ninety dollars a bar.

Each of the defendants moves that the Government be compelled to elect upon which of the number of separate and distinct and unrelated and disconnected criminal agreements, the proof as framed shows to have been established that the Government seeks a conviction. Defendants contend that the testimony of the witness Radcliff discloses that he had an agreement with Dave Jones and Hanson, a brakeman on his train, to steal certain shoes that have been admitted in evidence, and to steal certain matting. That he testified on the witness-stand that he never had any further criminal agreement with any of the defendants here, or any person here, except the arrangement

(Testimony of John Winquist.)

that he made with this decoy salesman Ayers. He does say that Ethyl Hanson was in the automobile with them. Ratcliff admits that he never saw Fowler and never saw Mellison until he saw him in the morning, or night, together with the defendant Fowler. That he had no agreement with him.

Motion to compel Government to elect denied.

Exception allowed.

Motion for a directed verdict for the defendant Bellamy denied.

Exception allowed.

Motion for a directed verdict for the defendant Paris denied.

Exception allowed.

Motion for an instructed verdict for the defendant Sarah Jones denied.

Exception allowed.

Motion for a directed verdict for the defendant Ethyl Hanson, Herbert William Hanson and Dave Jones on each count of the indictment, denied.

Exception allowed.

Motion for a directed verdict for Trepanier. Motion granted. [119]

Motion for a directed verdict for Mrs. J. A. Lewis denied.

Exception allowed.

Motion for a directed verdict for defendant George E. White denied.

Exception allowed.

Motion for a directed verdict for defendant Mel-

(Testimony of John Winquest.)

lison for each count of the indictment. Motion denied. Exception allowed.

Motion for a directed verdict for defendant Fowler on each count of the indictment. Motion denied. Exception allowed.

Motion for a directed verdict for defendant Creed Lane denied.

Exception allowed.

Motion for a directed verdict for T. E. Jones denied. Exception allowed.

Motion for a directed verdict for defendant Thomas Jones on each count of the indictment denied. Exception allowed.

Motion for a directed verdict for defendant Paris granted.

All the motions for directed verdicts were made up on the grounds that there was insufficient evidence to carry the case to the jury or to sustain a verdict. There was no testimony showing connection between the respective defendants in the case.

Motions for directed verdicts were made separately as to each defendant by respective counsel.
[120]

Testimony of Sarah Jones, for the Defense.

My name is Sarah Jones. I am 47 and married. My husband's name is T. E. Jones. I have been married 27 years. I have a daughter just 23. My husband and I have lived in Auburn 14 years. For about 14 years my husband ran a general merchandise store in Auburn. About two years ago he dis-

(Testimony of Sarah Jones.)

posed of the store which he had maintained in a two-story brick building. I took care of the rooms upstairs, running a little hotel by the name of the Lloyd Hotel. Have operated the hotel for eight years. There are 23 rooms in the hotel. The hotel office is room No. 7, that room being used for keeping suitcases and packages, you know, that people would leave when they came. They would put their grips in there, but I would not know they would put them in there. At night I used it as a sleeping-room. There was a bed, chiffonier and a dresser in there. February 26, 1920, Mr. Brown and Mr. Payne and two or three other men came to the Lloyd Hotel. They had been drinking some. They said they had a search-warrant for room 31.

Brown went through my dresser and found two pair of shoes—one gentlemen's shoes and one ladies' shoes. Exhibits 16D and 42 are the shoes that were found there. I found them in the hallway. They laid around in the hallway for a couple of days and I just picked them up and put them in there, figuring that someone would call for them. When I picked them up they were wrapped in a newspaper. Nothing that was in the suitcase belonged to me. I told the men that I found the shoes in the hall, and the dressgoods I got in our store.

I know George E. White. He roomed there, and when he would come in I would say how do you do, but nothing more than that. He had been in the house several years and went to France and then came back and came up to the hotel. [121]

(Testimony of Sarah Jones.)

My acquaintance with Bourdell was the same as with White. I never talked to White, I think, regarding stolen property or looting railroads, removing of seals from cars, stealing the goods of the United States, or purloining, or appropriating to my own use, or the use of another person goods of the Government. I have known Mr. Jones for several years. I do not know Creed Lane, Ratchiff, Hanson or Mrs. Hanson. I would not know Fowler if I met him on the street. I do not know Singer or Mellison. I never had any conversation about them or about stealing or anything of that kind. I had no way of knowing that any of those defendants were engaged in any unlawful enterprise. I never saw White or Bourdell or any other lodger of the hotel bring in any goods that appeared to be suspicious.

Cross-examination.

I kept personal belongings in the same bureau in which the shoes were found. The shoes were wrapped in one bundle when I put them in the bureau drawer. I had never noticed that the identification marks on Exhibit 42 had been obliterated. The grip marked 16A looks like one of the grips found in my hotel, and 16, a cane grip, also looks like another one. They found two grips in my house. They were found in my bedroom which is also used as an office. The officer opened the grips and I heard them say there was some coffee and some fruit in them. I heard them mention some razor strops. I left the hotel on March 22d and went

(Testimony of Sarah Jones.)

over to the camp where my husband was at Lake City, in Seattle. I had brakemen, conductors, switchmen and trainmen as guests more or less all the time I ran the hotel. The package of ladies' shoes was found in the hall and I just picked them up and put them in the office. [122] They were thrown around there several months, and that is the way the paper got torn off. The hall was upstairs, and it has a stairway up there, then, with rooms on each side, all around the place. I do not remember whether I had any lady roomer at the time I found the shoes. I had possession of them for six months.

Testimony of Tallie E. Jones, for the Defense.

Direct Examination.

I am the husband of Sarah Jones, the defendant, who has just been on the stand. Until two years ago I carried on a general merchandise business at Black Diamond and Auburn, and I am now in the contracting business. My wife was proprietor of the Lloyd Hotel at Auburn for eight years. I I know White and Bourdell when I see them. I have talked with them once in a while. I saw a couple of pair of shoes around the hotel for a while.

Testimony of Miss M. K. Jones, for the Defense.

Direct Examination.

My name is Miss M. K. Jones; 23 years old; the daughter of Sarah Jones and Tallie Jones. I have

(Testimony of Miss M. K. Jones.)

lived in Auburn about eighteen years. I lived at the Lloyd Hotel about eight years. I was in the Lloyd Hotel on February 26th when Mr. Connor, Mr. Ramage, Mr. Loveall and Mr. Payne and two or three other men came. I believed the five men to be intoxicated. I had seen the shoes in a bundle lying around for some time. I know White and Bordell casually. I heard Deputy Sheriff Brown ask my mother about the shoes, and she told him she picked them [123] up in the lobby; that they had been lying around there. And the dressgoods, he was going to take that, and she said that is mine. I had that since Mr. Jones, my father, went out of business. I personally know when my father went out of business; I went down and cut off yards and yards of different kinds of material, and I think my father gave my mother a few pieces.

Cross-examination.

I saw the shows when they were in the hallway, and I saw them in my mother's room.

Testimony of S. Cavanaugh, for the Defense.

Direct Examination.

The reputation of Sarah Jones for honesty is good.

Cross-examination.

I never heard anybody discuss her reputation.

Testimony of W. R. Wiley, for the Defense.

Direct Examination.

The reputation of Mrs. Sarah Jones for honesty is good.

Cross-examination.

I never heard her reputation discussed before this trouble came up.

Testimony of Mrs. Alfretta Moss, for the Defense.

Direct Examination.

Sarah Jones' reputation for honesty is good.

Testimony of John X. Mills, for the Defense.

Sarah Jones' reputation for honesty is good.

Cross-examination.

I never heard it discussed. [124]

Testimony of David Jones, One of the Defendants.

I am David Jones, living in Auburn, and my business is a railroad brakeman. I have been a brakeman since August, 1916, outside of two years in the service of the Government. I was in the submarine service. I came back to Auburn and became a railroad brakeman. I returned to Auburn June 27, 1919. I worked for Conductor Ratcliff. On March 20, 1920, on the train from Ellensburg to Auburn I was swing brakeman or middleman. My duties were switching, hot-boxes, brakes, rigging, dragging. The crew was Conductor Ratcliff, Mr. Hanson, myself and Goldman. Hanson was the rear brakeman or flagman. Goldman was the head brakeman. Hanson was stationed on the rear

(Testimony of David Jones.)

of the train at the caboose, and Goldman on the head end, at the engine. James Losby was the engineer and Johnson was the fireman. Conductor Hutchinson got on the train at Easton and dead-headed to Auburn. I had a quarrel with Ratcliff on the 20th of March, 1920, in the caboose. He was denouncing the Government when I balled him out. Conductor Ratcliff set off a red fusee and stuck it on the side of the cupola of the caboose. When the train stopped Ratcliff was out on the front platform, and he went up beside the train down on the left-hand side. I saw Hanson on the ground alongside of the caboose. When the train started I climbed on the caboose. The train had pulled down ten or fifteen car-lengths before Conductor Ratcliff got on. No other stops were made at or near Mile Post 91. I never made any more trips with Ratcliff; I asked to be relieved. I saw no shoes or other merchandise on this trip. I did not see any seals on any cars broken. I never had a conversation with Ratcliff or Hanson about shoes or merchandise. No matting was thrown off the train on March 3d. [125] The right of way is open at Easton. On the way back I did not pick up any matting or have anything to do with any. I had no agreement with Lemuel Fowler, Mellison, or any of the other defendants named here to steal.

Cross-examination.

I am the son of Sarah Jones.

(Testimony of David Jones.)

Redirect Examination.

I am a member of the Brotherhood of Railroad Trainmen; I do not think Ratcliff is.

Testimony of James Frederick Losby, for the Defense.

I am a locomotive engineer for the Northern Pacific, and have been for twenty years. I live in Auburn. I was the engineer on the train going west from Ellensburg to Auburn on or about the 20th of March, 1920. Ratcliff was the conductor; the brakemen were Goldman, Jones and Hanson. Goldman was the head brakeman and rode on the engine. Jones was the swingman. The train stopped at Mile Post 91 for about 20 minutes. I saw brakeman Jones about 15 or 20 cars from the engine. There was a red fusee burning on the rear of the train. I did not see any hot-box.

Cross-examination.

The only side of the train I could see was the right-hand side. I am a member of the Order of Engineers. The Brotherhood of Railway Trainmen is a different order altogether and they are not affiliated in any way.

Testimony of Henry Goldman, for the Defense.

I am a brakeman employed by the Northern Pacific. I know Jones, Hanson and Ratcliff. On March 20, 1920, coming from Ellensburg to Auburn, the train stopped at Mile Post 91. [126] The engineer said he stopped for a red fusee. I did not see any hot-box.

Testimony of R. A. Hutchinson, for the Defense.

I am a freight conductor on the Northern Pacific. I rode on the train from Ellensburg to Auburn on March 20, 1920. I got on at Easton. Ratcliff was conductor and Jones and Hanson were brakemen. I did not hear any conversation between Ratcliff and Hanson and Jones about stealing shoes. I was in the caboose all the time. I saw Hanson at the rear of the train. I saw David Jones at the right-hand side of the train.

Testimony of David Jones, for the Defense.

Direct Examination.

I never knew Mr. Ayers until I saw him on the witness-stand here. My apartment is No. 5 Brooks Apartments, Auburn. It was searched but nothing was found.

Testimony of Stanley Wallace Brown, for the Defense.

Direct Examination.

I am cashier of the Citizens' State Bank of Auburn. David Jones' reputation for honesty is good.

Testimony of J. R. Wallace, for the Defense.

I am a justice of the peace at Auburn. The reputation of David Jones for truth, veracity and honesty is good.

Testimony of W. I. Wiley, for the Defense.

I am in the grocery business in Auburn. David Jones' reputation for honesty is good. [127]

Testimony of S. Cavanaugh, for the Defense.

I am vice-president of the Citizens' State Bank of Auburn. David Jones' reputation for honesty is good.

Testimony of Herbert William Hanson, for the Defense.

My name is Herbert William Hanson. I live in Auburn. My occupation is railroad brakeman. I worked for the Northern Pacific since June 1st, 1917. I am 31 years old and married and have one child. I know David Jones and William Ratcliff. On March 20, 1920, I was running from Ellensburg to Auburn. Conductor Hutchinson got on the train at Easton. Ratcliff got a fusee. Jones asked him why he stopped the train, but got no answer. I had no conversation with David Jones about pilfering any box-car, or with Ratcliff either. I had Ayers working on my car at Auburn. He ran a repair garage there. I had him overhaul the engine. Ayers told me he wanted to sell me some tires. I purchased a 30 by 31½ tire from Ayers and paid him fifteen dollars for it. I never had any matting in my possession. I never had a conversation with Ayers in the presence of Mrs. Hanson and Mr. Lang in which I offered to sell him some merchandise consisting of pig tin. I never delivered any

(Testimony of Herbert William Hanson.)

merchandise to Ratcliff's house. I never put any rolls of matting off the train. They found one automobile tire in my house. I owned a machine at the time and the tire fitted the machine. I only know George White to speak to him. I worked one trip with Bellamy. I know the defendant Bordell only to speak to him. I know James Francis Mellison when I see him. I know Joe Bargas to speak to him. I do not know Thomas Singer. I know Mrs. Creed Lane and Mrs. J. A. Lewis just to speak to them. [128]

Cross-examination.

Ayers claimed that the tire he sold me was a second-hand one. I am a member of the Brotherhood of Railway Trainmen. I know David Jones. I do not know whether either White, Bellamy or Paris are members; I cannot say whether Mellison or Creed Lane are members. I have known Mrs. Lewis probably ever since we have been living in Auburn. When I first came to Auburn I stayed at her hotel two or three times. I did not go out on the highway to meet father. I did not know anything about father. I did not meet Ratcliff on the night of March 27th, and I did not tell Ratcliff to collect any money for me. I know nothing about the shoes.

Testimony of Stanley W. Brown, for the Defense.

On March 27, 1920, at Auburn about 7:30 in the evening, I saw Hanson and Mrs. Hanson. Hanson owed me some money and told me he would have his pay check in a few days and he would pay it.

Cross-examination.

I met him on the corner of First and Silver, Mr. and Mrs. Hanson were in their automobile.

Testimony of S. M. Griffin, for the Defense.

On March 27, 1920, I saw Herbert William Hanson and Mrs. Ethel Hanson on the streets of Auburn between 9:30 and 10 o'clock.

Testimony of Henry Lang, for the Defense.

My name is Henry Lang. I resided in Auburn 20 years. On March 27, 1920, Hanson and his wife came home close to 11 o'clock. They left the house between 7 and 8. I do not know how to make whiskey. I did not hear any conversation between [129] Hanson and Ayers about selling some tires and some tin and cigarettes.

Cross-examination.

Ayers was there once or twice.

Testimony of Jack N. Windley, for the Defense.

Direct Examination.

I am the owner of the Auburn Garage and the agent for the Chevrolet car. I sold Hanson a Chevrolet car. I rented my machine-shop to a man named Ayers. He got into jail and I cancelled his

(Testimony of Jack N. Windley.)

lease. I told him I did not want him there any more. Herbert William Hanson's reputation for honesty is good.

Cross-examination.

Ayers was introduced to me by R. C. Rice, who drives a stage between Seattle and Auburn.

Testimony of George W. Colby, for the Defense.

My name is George W. Colby. I have lived at Auburn since 1913. I am by occupation a locomotive engineer. I worked for the Northern Pacific 17 years and I know Hanson and his wife. I have lived in the house with them. I know Roy Ayers. I heard a conversation between them about overhauling the engine of a car. I heard them talk about overhauling the engine of M. J. Forler's car.

Cross-examination.

I left the Hanson house in the middle of 1919 and went to the St. Elmo Hotel run by Mrs. J. A. Lewis, the defendant here. I was working running a switch-engine in the Auburn yard up until the first day of February for a year and one month. On February 1, 1920, I went out on the road. [130]

Testimony of Gorman John Forler, for the Defense.

I have lived in Auburn six or seven years and worked as an engineer for the Northern Pacific Railroad. I was in the Auburn Garage in the City of Auburn and Herbert William Hanson and Goldby and Ayers were present. I went down there to have my car overhauled. There was no conversation about shoes or tires.

Testimony of William S. Dippo, for the Defense.

I am a jeweler in Auburn. The reputation of Herbert William Hanson for honesty is good.

Testimony of Samuel L. Ackerman, for the Defense.

I am in the clothing business in Auburn. The reputation of Herbert William Hanson for honesty is good.

Testimony of Ethyl Hanson, One of the Defendants.

My name is Ethyl Hanson. I am the wife of Herbert William Hanson. I have a boy eight years old. Mr. Lang lives in the house with us. Prior to March 27, 1920, I was never at the home of Mr. and Mrs. Ratcliff. I do not know Mrs. Ratcliff. On the evening of March 28, 1920, I left my home in the machine of my husband to look for my little boy. He had been away all the afternoon. Ayers used to visit our house. But my husband refused him admission because he had insulted me. Prior to the first of the year 1920 Ayers brought a tire to my house and sold it to Mr. Hanson. It fited the wheel of our machine. Ratcliff never came to our house. I never heard a conversation between Ayers and Mr. Hanson when Mr. Lang was present when Mr. Ayers offered to buy and Mr. Hanson offered to sell some pig tin and some cigarettes and some automobile tires. I do not know Mrs. Lewis, Edward Bordell, James Mellison, David Jones, T. E. Jones, Clarence Bellamy, Sarah Jones or Creed Lane. [131]

Testimony of Thomas S. Singer, One of the Defendants.

I am Thomas S. Singer. I live on Cremona Street, Seattle. I am married and have lived in Seattle since 1908. I was born in Russia and came to this country twenty years ago. I am now 34 years old. All my life I followed the hair-goods business. I have been in the hair-dressing business ever since I have been in Seattle. I now have a place on the third floor of the Denny Building. Just prior to that I was located at 1330 Second Avenue, main floor. In my hand I hold a paper showing a rough draft of my store. The office is shared between myself and Mr. Clark, my partner.

Testimony of Mrs. Edith Hill, for the Defense.

I live in Seattle. I have been employed since October 20th, making wigs and toupees in the employ of Thomas Singer.

(Diagram of Singer's store admitted as Defendant's Exhibit "D.")

There are shelves in the room I work in. They hold mostly hair boxes and some forms and models and dummy heads. I saw a package on the shelf there. It was there two or three days. A new box of tubes came in and the parcel was put in a large wooden box without a lid. The new box of tubes was set on the top. That was the only place the new box of tubes could be set as the room was all filled up. The parcel stayed in the box about a

(Testimony of Thomas S. Singer.)

week. I saw Mr. Clark with the parcel in his hand when the tubes came in, and I saw him put it in the box. There were four boxes on the floor.

Testimony of Thomas S. Singer, One of the Defendants.

I have known defendant Bordell seven or eight years. I became acquainted with him when first he came in and left an [132] order for a toupee. After that I would see him whenever he would come into the store for a haircut. I saw him in the middle of January last. I had not seen him for a long time prior to that as he was in France in the army. I do not know how long he was in France. He wrote to me at some time to send some placer for a toupee. When he came in in the middle of January he left an order for a toupee. It was January 16th that it was entered in the order-book, and shows on page 424. The order was put in in Mr. Clark's handwriting. I made none of the entries in the order-book. I take the measure of the toupees, and the entries are made by Mr. Clark in my presence. I take the pattern, and measure, and sample, and give those to Mr. Clark to put on the book.

(The Court admitted in evidence Defendant's Exhibit "E," being page from the order-book referred to.)

"January 16, 1920, Ed. Bordell, City, To 1 Toupe, del. Nothing paid." Mr. Clark put that there. The toupee was delivered on the 30th of January to Mr. Bordell. Bordell came into the

(Testimony of Thomas S. Singer.)

office and I asked him into the haircutting room, room 5, while I trimmed his toupee and trimmed his hair. He said, "Tom, I have an overcoat. Try it on and see *it if* will fit you." So I took that overcoat and put it on, and the overcoat could not have fitted me any better. After I tried the overcoat on and I saw it fitted me good I asked him how much he wanted for it. Bordell said, "I will tell you what I will do. Suppose we call it square. I will take the toupee and you take the overcoat in payment." The price of the toupee was supposed to be forty dollars. I told him that was dandy with me. He didn't tell me where he got the coat, but I saw that Hart, Shaffner & Marks sign on it and I assumed he got it there. [133] He said it was a little too small for him. When he came into the room he had the overcoat with him. I do not know whether he had it loose on his arm or in a bundle. While he was talking to me he had the overcoat on his arm. I do not know where the coat came from. I had no knowledge or no suspicion that it had been taken by any person from an interstate shipment of merchandise; if I had I would not have bought it. I never bought anything else off of Bordell. Mr. Clark's testimony as to the examination by me of some shoes that Bordell had and about me asking him to try on a pair and asking him if he wanted a pair, that is a deliberate prevarication. No such conversation took place, and I have never seen a pair of shoes in there. Bordell came in one day and said to me, "Tom, do you know a reliable shoe

(Testimony of Thomas S. Singer.)

man that I can sell some shoes to?" So I told him I might know somebody. So in the meantime I met a fellow here on Third Avenue. I was going up there to see a store that a man had, and that man was Armstrong. While I was talking to him about the store I came to the conclusion that the store was too small. He had a little place for rent, and I said to him at that time, "I know a fellow who has some shoes to sell and I could bring him up to see you," and he said, "Yes; do that." Bordell was not present. When I met Bordell again I told him about it, and he had a little black satchel with him, and I took him up and introduced him to that shoe man. I spoke a few words to Mr. Armstrong and then went away. Bordell never tried to sell me any shoes. I never told Clark that Bordell was in the railroad business or that he was getting merchandise from trains. I never had any knowledge of such a thing. Bordell told me after he came from France that he was buying up merchandise stock in little towns, that he [134] was making his living in that way, and I believed him. One day the officers came to my place with a search-warrant and they found a parcel in a box in the store. The officers came in and handed me a search-warrant and I looked at the search-warrant and I didn't quite understand what it was for. I read it through, and after I got through I said, "Gentlemen, you are welcome to search the rooms if you want to." I gave them full authority to go through everything if they wanted to go through it.

(Testimony of Thomas S. Singer.)

And Mr. Winquist, this gentleman here, picked up my overcoat that was hanging on a hat-rack where the customers hang their hats, and I hung my hat and coat up there too. It is in the room that you come into when you first enter the place, the sales-room. So Winquist took the overcoat, and he said to me, "Where did you get the overcoat?" Well, all my people were in the room at that time, and at that time for some reason I did not want to say just exactly the words I have testified here, for the simple reason that I did not want all my employees to know that I had such a thing as a second-hand coat, and unfortunately I said this other thing. I said I got the coat from Hart, Schaffner and Marx place. It is a Hart, Schaffner & Marx coat, and so I didn't have any reason to believe otherwise. I got the coat from Bordell. Winquist took the coat away. They took my other overcoat but they returned it the next day. Mr. Winquist brought it back. I have never seen any of the other defendants except Bordell. They took two suits of clothes out of my place—one gray and the other a dark color. Bordell came in one day about the time I got to the shop and I took him into the haircutting booth and gave him a haircut. And after he left another gentleman came in, and we had been talking about this fellow. He had never had a toupee before and [135] he was talking about a toupee and I was trying a toupee on him, and while I was talking to him I happened to look over in the corner of this room—in the same room as my haircutting

(Testimony of Thomas S. Singer.)

room—right about in the corner, and I saw a bundle wrapped up in paper, and at that time I thought that this was this fellow's bundle. So I did not say anything to him. Finally he went out without buying a toupee and said he would drop in in a couple of days and give me a deposit. So when I saw that package I was rather glad with the chances that he had forgot the package after he left, that he was coming back for it. So I told that to Mr. Clark. I said to Mr. Clark, "That fellow will sure be back, because he left a package." So I took the package and put it into my room, which it is marked No. 7, and I forgot all about it. The next morning I happened to see the bundle wrapped in white paper, that is, not ordinary wrapping paper. It was laying on one of those boxes with hair in it. I said to him, "What is that bundle, Jack?" Clark says, "That is the same bundle that fellow left here the other day." I said to him, "Why, it has a different paper on it." "Well," he says, "It was torn, and I re-wrapped it." So I took that bundle and took it back into the bigger room, because this room is very small, and put it on a shelf. That is all I know about the package. I do not know where the officers found it. I told them when they found it that it was left by a man there. I never knew that these two suits of clothes or that overcoat had been part of a shipment which was stolen from the Northern Pacific Railway. I never negotiated with Bordell for any merchandise that had to my knowledge been stolen. I never

(Testimony of Thomas S. Singer.)

talked with Bordell directly or indirectly with any reference to any property that I knew or had reason to believe had been [136] stolen. I never had any communication with anybody else in this case with reference to property that was stolen. I have never been arrested before.

Cross-examination.

I do not know who brought the package of clothes to my place. I thought it was the man who left the order, because that is the first time I saw the package. I did not know what was in the package until the officers found it. Bordell was in the same day. He had a haircut. It might have been Bordell that brought them in. I told Clark, "You will have to charge Mr. Bourdell's toupee to me, because I got that overcoat from him." "Well," he said, "I will tell you, Tom, I have had two toupees made by the firm here, and wearing myself, we will call that square." I said, "All right, Jack, we will let it go at that." I have never traded a toupee for an overcoat or a suit of clothes before. I never told Clark he could get shoes and overcoats if he wanted them. I took Bourdell to Armstrong because Bourdell told me he had some shoes to sell. I did not know he was a railroad man at that time. He told me he came from France he was buying up stock from little towns. He asked me if I knew anybody he could sell shoes to. He said he was buying up bankrupt stock from little towns. The clothes had not been found when I made the remark about the overcoat. The overcoat stood me for forty dollars.

(Testimony of Thomas S. Singer.)

Redirect Examination.

I have been in business with Clark for about two years. He bought a half interest with me for six thousand dollars. We have not been on good terms since we moved upstairs. He was growling about his bargain. [137]

Recross-examination.

Clark saw the coat on me the day I got it from Bourdell. Clark asked me where I got it, and I told him I got the coat from Bourdell on that day that I got it. I never told Clark that I got the coat from Hart, Schaffner & Marx and paid \$65 for it.

Testimony of I. B. Knickerbocker, for the Defense.

The reputation of Tom E. Jones for good citizenship is good.

Cross-examination.

I have done a little business as a lawyer for Mr. Jones.

Testimony of W. W. Downing, for the Defense.

The reputation of Tom E. Jones for citizenship is good.

Testimony of James B. McGilvrey, for the Defense.

Direct Examination.

The reputation of Thomas E. Jones in the community for being a law-abiding, honorable and upright citizen is good.

Testimony of George Krouse, for the Defense.

The reputation of Tom E. Jones for citizenship and honesty is good.

Testimony of Dr. B. E. Hoyer, for the Defense.

The reputation of Creed Lane for citizenship is good.

Testimony of W. T. Behna, for the Defense.

The reputation of Creed Lane for honesty and citizenship is good.

Testimony of James A. Reilly, for the Defense.

The reputation of Edward Bourdell as regards being peaceably disposed, upright and lawabiding is good. [138]

Testimony of W. S. Dipbo, for the Defense.

The reputation of Edward Bourdell is good.

Testimony of Samuel Ackerman, for the Defense.

The reputation of Edward Bourdell for being an upright and law-abiding citizen is good.

Testimony of B. M. Bird, for the Defense.

The reputation of Thomas Singer for truth, veracity and honesty and fair dealing is good.

Testimony of Adolph Behrens, for the Defense.

The reputation for truth, veracity, honesty and fair-dealing of Thomas Singer is good.

Testimony of Alexander Malamud, for the Defense.

The reputation of Thomas Singer for truth, honesty, veracity and fair dealing is good.

Testimony of George C. Rickard, for the Defense.

The reputation of defendant Singer for truth, veracity and honesty and fair dealing is good.

Testimony of Hazel Downing, for the Defense.

My name is Hazel Downing. I am employed at Singer Incorporated in the Denny Building. I did all the work in the hair-dressing establishment. I remember the officers getting a package from the workroom. The package was in a box underneath some shelves. I do not know who put it there. I saw Mr. Clark tying it up when I came to work one morning. He was putting wrapping paper on it. There was newspaper on the floor. Mr. Singer brought the package in one day and left it in the workroom where I was working, and left it under a shelf, saying that a man would call for it in a few days. It was there for a few days and I did not see it again until the officers came in and got it. Mr. Clark and Mr. Singer do not get along very well.

[139]

Testimony of Thomas Singer, One of the Defendants.

I heard Mr. Clark testify that after the preliminary hearing before the United States commissioner that I had told him that he had cooked my goose. I never made any such remark.

Testimony of H. E. McIntire, for the Defense.

The reputation of Creed Lane for honesty is good.

Testimony of J. Harry Price, for the Defense.

My name is J. Harry Price. I am 35 years old. I live at Seahurst Part, Seattle. I am the son of the late James Price, Secretary of the State of Washington. I was born in Tacoma. I am in the

(Testimony of J. Harry Price.)

lumber business. I have known Creed Lane for seven or eight years. I saw him in Auburn in the month of February last. He was standing near the moving-picture show and I was in my car. In the afternoon of February 16th I bought a Buick car. About eight o'clock when over on the highway near Auburn I decided to go into Auburn. My wife has two uncles living there and I thought I would drive over there and let them see this car. I was going along the main street when I happened to see Mr. Lane standing there by the moving-picture show. I had seen Mr. Lane on the street some time in December or January and he told me he had some potatoes he wanted to sell. I asked him about the potatoes and he said all right. I drove from the picture show two and a half blocks and we turned along the road and he directed me. We turned south—I believe it must have been south—and he directed me, and as we went to turn a curve, and went underneath a railroad culvert, and came up on the river bridge, my headlights shown on what looked like a body to me at first, and as I got nearer it was magnified,—and I pulled up, so as to clear myself in the road, so that if anybody came around, I would be in the clear [140] with my car. Mr. Lane and myself got out and walked over to this stuff, and it was the greatest bunch of junk I ever saw. There was a shotgun there and some other stuff covered with canvas. The stuff was all heaped up. It lay right off the county road. I saw it first. I made the remark to Lane, or he possibly to me,

(Testimony of J. Harry Price.)

as to how that stuff got there. And he said he did not know. He said, "What is the matter with picking it up and taking it up to my house?" So I left my car where it would be safe and he and I picked the stuff up and packed it up to his kitchen.

Cross-examination.

The night I met Mr. Lane was February 16, 1920. I met him accidentally. It was about eight o'clock in the evening. I bought a sack of potatoes from him that night and brought them home. I recognize the black suitcase. There were some tan shoes, probably a dozen pair. They were all in a bundle. I found a shotgun. I examined the shotgun. There was a suitcase and a hand-bag, and the hand-bag was heavy enough. There was socks. I was in Lane's house for about ten minutes. I did not see anybody else at his house. I told no one about finding any of this stuff off the side of the road. Lane came over to my house and asked if I remembered the incident.

Testimony of Creed Lane, One of the Defendants.

My name is Creed Lane. I am 40 years old. I was born in Tennessee. I have lived in Washington since June, 1911. I resided with the exception of two weeks of that time in Auburn. I lived on fifteen acres of ground three miles south of Auburn, near Stuck River. I have a wife and three children. I was living there last February. I was in Auburn near the picture show when [141] Price drove up, and went to my place to get a sack of

(Testimony of Creed Lane.)

potatoes. We went two blocks east and turned to go to my place. Going over on Stuck River bridge, the approach to the bridge after you get off the south approach of the bridge, you turn under the Northern Pacific tracks, and there is a very sharp curve there, with only room for one car to pass under those railroad tracks. The wagon road runs under the tracks. Mr. Price spoke and said, "What is this ahead?" We drove up a little closer and stopped and got out and found this bunch of merchandise. I know they took the stuff away from my house on February 17th of this year, all of it. It was taken away from my house the next day following the time when I found it. Price and I found it on the night of the 16th, about 8 o'clock. Price backed his car up and picked up the stuff and put it in the car and packed it into the house. I told Mr. Price to leave the stuff with me and I would ask some attorney in Auburn if someone did not call for it right away, and I would find who the owner was. The following day the officers came and got it. I did not steal or take any of that property or any part of it from the Northern Pacific Railway. I did not know it was stolen.

Cross-examination.

I had no reason to suspect that it was stolen and did not suspect it. The coats I hung up in my bedroom—I believe there were five or six—and some of the heavy shoes were put in the little shed back of the house. There was some Bootjack tobacco and one carton of cigarettes out there. The officers

(Testimony of Creed Lane.)

found all the stuff that I found. On February 17th I talked to Winquist about the Northern Pacific pass. I told Winquist about another gun that I did get in Easton. There [142] were three other guns in the house. I heard the Wheel Report read here to the effect that these overcoats were in a train in C. P. St. L. Car 4188, a train hauled from Ellensburg to Auburn by a crew of which I was a member. I was a brakeman on the train that hauled C. P. St. L. 4188, the train that hauled a shipment of cutlery.

Redirect Examination.

Government Exhibit 32 is my pass. The last time I saw it was February 5th. I lost the pass. I had it in an ordinary suit of clothes that I carried on the caboose to slip on at the home end of the trip. Leaving Ellensburg I changed my clothes and put on work clothes, and when I got to Auburn on the night of the 5th and went to change my clothes the clothes were gone. I left them hanging in the caboose. But the clothes were gone and my pass and an old switch-key that was in the clothes. I discovered it on the night of the fifth of February, 1920, at 10 o'clock, and I immediately wrote a letter to Mr. Robinson, trainmaster of the Seattle Division. I reported the facts to Mr. Brastrup, assistant trainmaster at Auburn, and asked him for a switch-key in the place of the one I lost, and he said he had none. I then told him about losing the clothes and pass and switch-key. He said I had better write Mr. Robinson. My conversation with

(Testimony of Creed Lane.)

Brastrup was two or three days after I had lost the suit. Caboosees have an ordinary Northern Pacific door lock and a pass-key, and I believe that any pass-key unlocks them. A regularly assigned crew ordinarily keeps the same caboose for a number of trips, maybe two or three years. I was one of a regular train crew. Mr. Jones was my conductor. I was a front brakeman. The regular men were Mr. Bourdell and Mr. Bellamy. Defendant's Exhibit "F" is a key [143] that will unlock the caboose or unlock any caboose or any coach. I have seen them unlock the door in a station. I do not know anything about the stuff taken from the caboose at all. I was not working steadily in January and February. February 14th was the last work I did prior to March 26th on the Northern Pacific.

Recross-examination.

I heard the testimony that a train from Auburn to Ellensburg, February 6th, of which I was a member of the crew had my pass. I was arrested at my home on February 17, 1920. I don't think I ever told them or asked the officers to ask me no questions about the stuff.

Testimony of John R. Wallace, for the Defense.

I am a justice of the peace in Auburn. I issued a search-warrant for the home of Thomas E. Jones. These papers constitute a complaint and warrant issued upon that complaint. The warrant was given

(Testimony of Mrs. Etta Lane.)

by me to Deputy Sheriff N. L. Loveall.

(The complaint and search-warrant were admitted as Defendants' Exhibit "G.")

Testimony of Mrs. Etta Lane, for the Defense.

My name is Etta Lane. I am the wife of Creed Lane, one of the defendants in this case. I have been married 20 years. I live three miles south of Auburn. There are five in the family—three children and us two. I know Harry Price drove out to our house on the night of February 16th between 8 and 9 o'clock. Mr. Price and Mr. Lane brought the goods in our house. I was in bed at the time when they came, and the children were both in bed. Price stayed in the house about ten or fifteen [144] minutes. My husband told me where he had found the property. The officers came about three o'clock the next day. We live on a ranch.

Cross-examination.

When I saw Price that night I did not know his name. My bedroom was off the kitchen and there was a light in the kitchen. There was no light in the bedroom. I looked out to see who it was, but I do not think they saw me. The stuff was brought in a canvas cover. Mr. Lane told me that he had sold Price a sack of potatoes. I got up after Mr. Price went out and we took the stuff off the floor and put it away and put it in where we could find room to lay it up. I saw the shoes and socks and shotgun. He put most of it away and I put part of it away. We laid it up wherever we had

room. He said he would probably make an inquiry as to who owned it.

Testimony of W. O. Adams, for the Defense.

I am clerk at the Northern Pacific Railway and was in February last. I was a trainmaster's clerk. I received a communication from Creed Lane regarding the pass said to have been stolen and a switch-key.

Testimony of Mrs. T. E. Jones, for the Defense.

I am the wife of Thomas E. Jones, one of the defendants. I have been married six years and live in Auburn. I was home the day the officers came and searched the premises. They went through the house and searched everything. They searched the dresser drawer, buffet, library drawers, and through the shelves, and from there they went down to the basement and into the garage. Mr. Connor and I were standing in the doorway while the others were searching the premises; and when they got through Mr. Connor asked them if they found anything, [145] and they said no, as they left. On March 19th Tobey, Winquist and Payne came to the house and Mr. Tobey handed me a search-warrant. I told him they had already searched there but I had no objection to their searching again. And they went through the house again, and these canvas gloves they were there the first time, and a half sack of sugar I had in the kitchen. They got five pair of canvas gloves. The gloves came from Friedman's, in Tacoma. They had a sale on there, and

(Testimony of Mrs. T. E. Jones.)

we bought six pair, and Mr. Jones took one pair to the caboose. From the tool-box down in the basement they got three automobile wrenches. We have had three cars in four years and the wrenches came from the cars. The shoes marked "31-Jones" are like those taken in the search. The rubbers marked "41-Jones" were there when we took possession of the house. The tablecloths were on the table, and Mr. Winqvist asked me, "How long have you had these?" and I said several years. And when they were ready to go they took my tablecloths. They were given to me while I was working in a restaurant. I have had them since 1915. A man brought them down to the restaurant and gave them to me. The brush marked "41-Jones" came from the 15-cent store in Tacoma, to clean the carpet-sweeper with. The wrench marked "T. E. Jones wrench," they did not get at my house. They did not get the chisels at my house. Those automobile wrenches look like the ones found in my house. They found a gun scabbard. I know nothing about what they got in the caboose.

Testimony of Thomas E. Jones, One of the Defendants.

My name is Thomas E. Jones. I have been in the employ of the Northern Pacific as a freight conductor. The last time I used the caboose was on March 26th. The lockers did not have locks on, and the outside doors lock with a caboose key, which [1461 a pass-key will unlock also. I left there

(Testimony of Thomas E. Jones.)

7:30 A. M. on March 26th, and there were no locks on the lockers then. I unlocked the outside door with the caboose key and stayed with them and saw them take out of the caboose the only thing that belongs to me—my mackinaw. The trip before that I bought three or four pounds of coffee and we put it on the car and we had quite a bit of supplies, and I brought out a lot of eggs and other stuff. When we are called we do not know whether we are going to stay out one or two days or two or three weeks, and the custom is to lay in a supply. It is common for all the crews to cook on the car. We had wrenches like that and chisels like that in the caboose. The wrench and chisel were not found in my house. I had three automobile wrenches just like that in a tool-box at home. I have had three cars in four years. Car C. P. S. & L. 4188 shows on the Wheel Report as having been in a train handled by me on January 25th. I think the car got in to Auburn on January 25th. Car 16,880 was handled by me, and had reached the Auburn yards at 10 P. M., September 12th. That car went to the house some time the next morning and was checked along in the morning. The car was left in the yard about 12 hours before it was spotted at the house. I was not responsible for the car after it reached Auburn. The seals were all O. K. as far as I know when the car reached Auburn. F. R. White, a brakeman, was a member of my crew. But George

(Testimony of Thomas E. Jones.)

White never was a member of my crew. I know nothing about any stolen property.

Cross-examination.

I have been in the railroad service 20 years. I am a member of the Railway Conductors, but not a member of the Brotherhood of Railway Trainmen, and I am not in any way bound [147] to it. I have nothing to do with brakemen and switchmen. The conductors have an order of their own, as the engineers do. They are not a member of the Trainmen. Bourdell, Lane and Bellamy were members of my crew. Most of the time our run has been between Auburn and Ellensburg, and as a conductor on a transcontinental train I picked up transcontinental merchandise left at Ellensburg and bring it to Auburn. We had a locker in the caboose, for our grub, and there was two lockers, one on one side and one on the other side. On the first of February the lockers had locks on them. They were taken off about the fifth of February. I never saw that cutlery before. I never saw that suit of clothes. The conductor has a regular bill for each car and knows what it contains.

Testimony of Walter W. Goodson, for the Defense.

Cars of merchandise arriving in the Auburn yards are generally set at night.

Testimony of S. M. Griffin, for the Defense.

I live in Auburn. I am assistant yardmaster for the Northern Pacific. I have held that position for five years. I have charge of the switching crews. Merchandise from the east, arriving at Auburn after three thirty P. M., is not spotted at the house until the following morning. The train crew has no control over the car. Car M. C. 61,880 was checked by Prentiss between six A. M. and eight A. M. The cars remained in the yard a great many hours after the crew brought it in. The expression "spotted at the house," means shifted into the platform for the purpose of unloading. It is part of the duty of the checkers to look over all the seals. There is no record of a broken seal to my knowledge on that car. If a car came into the yard with a broken seal the car would be carded up [148] on the arrival, and the carders would catch the broken seal and seal the car on the arrival of the car.

Testimony of Walter W. Goodson, for the Defense.

When a car is reported with a broken seal we send a man out to seal it up. I have no seal record of car M. C. 61,880. If it had a broken seal, as a rule I would have had a record of it.

Testimony of Mrs. Sarah Lewis, One of the Defendants.

I own the St. Elmo Hotel in Auburn, the largest hotel there, and I have had it for eight years. I came to Auburn and opened the hotel. I have been

(Testimony of Mrs. Sarah Lewis.)

in the restaurant and café business in Auburn. I know Mr. Ratcliff and Mrs. Ratcliff. They brought me a letter written by Judge Lawrence. They wanted me to go and see Judge Lawrence for them. Ratcliff had pulled a flag off an engine and Birt Clary had struck Ratcliff, and they wanted me to go and see Judge Lawrence. I told them that I could not go to Judge Lawrence about any such affair. I have not seen the Ratcliffs much during the last three years. About seven years ago Ratcliff was living at my hotel with the present Mrs. Ratcliff. Then he showed up with another woman. I asked Ratcliff, "Who was that woman sleeping in your room?" and he said, "That is my first wife." I said, "Aren't you afraid of your second wife?" He said, "I will ship this one out before long." He took her over to the café to eat, and the café woman told somebody about it, and Mrs. Ratcliff came and asked me about it. I told Mrs. Ratcliff I didn't know anything about it. Afterwards she found out that I was lying about it. Mrs. Ratcliff wanted to borrow two thousand dollars off me, and she told me about her boy being accused of having taken a package of diamonds at the postoffice. Ratcliff came to my [149] house asking about Fowler. Fowler is a jitney driver and operates an automobile up here in Auburn. I was in bed asleep and it was twenty minutes after midnight on the 27th, and Ratcliff said to me, "Do you know where Fowler is?" And I said, "I do not know, unless he is in his room." And he said, "What room?"

(Testimony of Mrs. Sarah Lewis.)

And I said, "Room 2." He walked to the room and I was going back to bed, and he rapped again and said, "He is not in his room." I said, "If he is not there I do not know where you can find him." Ratcliff said, "He promised to make a drive for a fellow and I want to find him." I said, "I have not any idea where you can find him." He said, "I will look around town." I was sleepy, I didn't know anything about his business, and I shut the door and went back to bed, and that is every word that was said between Ratcliff and I that night. I had not seen Fowler that day. I did not know he had an engagement to haul tires. I know Ayers. He has lived in my hotel about two and a half months. While there he was arrested for stealing automobiles. I knew he was a thief. He had that reputation in Auburn. He told me he was. I forced him to leave the hotel because it was terribly hard to get my room rent out of him. I did not tell Mrs. Ratcliff that if I had looked out of the window and had seen who her husband was with I would have told him he had better keep away from him. It was impossible to do that, as the room has no windows on the street. I know Mr. Lane by sight, although I have never spoken to him. I know Thomas Jones; he lived in my hotel until he was married. I do not remember Mr. Hanson at all. I have never spoken to him. I never knew Mrs. Hanson until this trouble came up. Mrs. Jones and I have been as friendly as two landladies in a town, that is all. I never visited with her. [150] She

(Testimony of Mrs. Sarah Lewis.)

runs another hotel. George White I only know to speak to. I shook hands with him on the street when he came back from the war. I know David Jones as an Auburn boy. I did not know Mellison until this trouble came up. Fowler is a guest in my hotel. They searched every room in my hotel. They took two brushes out of Glenn Crane's room and a couple of shirts out of different boys' rooms. They went through my room. They took six knives away from my house. I bought them in Seattle before Christmas up on Pike Street. There were 12 steak knives in a box. Payne took six knives and left six. This carving set was also in the box. (Defendant's Exhibit "H," the knives referred to, admitted in evidence.) I bought them on Pike Street about seven months ago. I know Scott. I never told him that I had any silverware gotten from the railroad.

Cross-examination.

I ceased running a restaurant six and a half years ago. The knives were in the original box in which they came. I have known Lemuel Fowler nine or ten years in Seattle and Auburn. He has been a roomer in my hotel ever since he has been in Auburn.

Q. You knew he was arrested and charged and convicted of stealing during that time?

Mr. DORE.—I object to that as incompetent, irrelevant and immaterial.

Mr. SANDERS.—I think, your Honor, we have a right to ask.

(Testimony of Mrs. Sarah Lewis.)

The COURT.—Objection overruled and exception allowed.

Q. Answer the question, please.

A. Yes, I did.

Redirect Examination.

I did not tell Mr. Payne the knives came out of a transient's room. [151] Mrs. Ratcliff told me that Ratcliff had stolen some good silk shirts, and that he had had a sale for the silk shirts, but at the time of the sale she kept out two very beautiful shirts, and she told me she would know them any place. She had put them down in the lower dresser drawer, and when Mr. Payne searched her place, he took those two nice shirts away, and a few days after that, I am almost sure it was in the postoffice building, and she was talking and joking with him, and he had on one of those silk shirts. She said, 'I looked at that shirt, and I says, 'Mr. Payne, when you soil that silk shirt of Mr. Ratcliff's I hope you will return it to him laundered,' He said, 'You had better shut your damned mouth; it is up to me who is indicted, and who is not indicted. If you don't look out, you will be indicted.' " She said, "I have to eat out of his hand." (Defendant's Exhibit "I," knives referred to, admitted in evidence.)

Testimony of Jack W. Brown, for the Defense.

My name is Jack W. Brown. I know S. L. Fowler. I saw Ayers in Auburn Saturday March 29th, 1920, between seven and eight in the evening on the main street. I was talking to Fowler. Ayers drove

(Testimony of Jack W. Brown.)

up in an automobile and said a few words to Fowler, and then jumped out, and talked to him and asked Fowler for a man by the name of Scott. Fowler said to Ayers that Scott was not around any place. So Ayers said, "You will do then." So Ayers jumped out of his car and asked Fowler if Fowler wanted to drive to Renton, I think it was—yes, it was Renton. Ayers said he wanted Fowler to drive to Renton for some automobile accessories. This was about seven o'clock Saturday night. Fowler said his car was not big enough, and [152] asked Ayers how much stuff he had. Ayers said that Fowler's car would do, that it was too late to get a truck. And I left and went on downtown.

Cross-examination.

I am in the cigar business at 1518 Pacific Avenue, Tacoma. I have done longshoring work also. I worked for the Northwest Steel Company in Portland. The first time I met Fowler was in the Northwest Steel yards at Portland, Oregon, a year ago in January. He was volter-up in the shipyards. I did not see him again until March 27th in Auburn. Mr. Shepard was with me. Shepard and I were fishing. Fowler introduced Ayers to me. I did not see Ratcliff or Scott that night. I do not know who Ratcliff is nor Scott either.

Testimony of M. W. Lawrence, for the Defense.

My name is M. W. Lawrence. I was justice of the peace in Auburn. During the war a complaint was made to me that J. A. Ratcliff, a railroad conductor,

(Testimony of M. W. Lawrence.)

was engaged in pro-German activities. Reports were made to me as head of the Minute Men. Their report was that Ratcliff had torn a flag off a flag-draped locomotive at Everett. I wrote to Mr. Ratcliff and I requested him in that letter to call upon me.

Testimony of Reginald C. Rice, for the Defense.

My name is Reginald C. Rice. I live in Auburn and I drive a stage between Seattle and Auburn. During the month of March in Auburn the witness Ayers offered to sell me some tires. He said he had any kind or any size tire. I told him I did not handle that kind of stuff. I presumed the tires had been stolen and I refused to buy them upon that presumption.

Cross-examination.

I was a conductor on the Northern Pacific for eight years [153] and have been brakeman for eleven years. I left the employ of the road on March 8, 1920. I know all the defendants in this case.

Redirect Examination.

Ayers offered to sell his automobile tires to a man by the name of *Doozon* and a man named W. R. Ferguson, another stage-driver.

Testimony of George E. White, One of the Defendants.

My name is George E. White. I have been railroad brakeman ever since 1907. I went into the United States Army in October, 1917. I went from

(Testimony of George E. White.)

Fort Lawton to Camp Grant, where I got a uniform. I put my civilian clothes in a suitcase and expressed them to E. White, my brother, at Suamico. I got back to the United States in June, 1919. I visited my brother and got my suitcase on the way home and brought it to Auburn to the Lloyd Hotel. I put the uniform back in the suitcase. I roomed with George Bourdell. At the time of my arrest I was living in the Park Hotel. Dobey and Winquist searched my room and found nothing in it. I threw the suitcase in the closet in the Lloyd Hotel. There was no razor strops in it when I put the suitcase in the closet. I never had any stolen property of any kind. I put the suitcase in the closet in September, 1919. That is my suitcase. I know Fowler since August, 1912. I do not know Mellison. I know Tom Jones as a railroad conductor. I never knew Mr. and Mrs. Hanson until this trouble came up. I knew Mrs. Lewis as the woman who ran the St. Elmo Hotel, and I used to speak to her wherever I met her and say how do you do. I know Mrs. Jones. I know Creed Lane as a brakeman, though I never worked with him. [154]

Cross-examination.

Immediately after my discharge from the Army I went to the Lloyd Hotel and commenced rooming in room 31 with Bourdell. I stayed in the Lloyd Hotel until the first of March. I never saw any of the razor strops marked as Government's Exhibit 21. Bourdell and I each had a trunk in the room, and we used the bureau in common. On January 21st I was on a train running from Ellensburg to Auburn. The

(Testimony of Lemuel S. Fowler.)

train crew was Bundy, Brown and myself and Envelson. Government's Exhibit "A" are not my shoes. I never had any reason to suspect Bourdell of larceny, and I never worked with Creed Lane. I worked three days with Bourdell on a gravel train.

Testimony of Lemuel S. Fowler, One of the Defendants.

My name is Lemuel S. Fowler. I have lived in Auburn since 1913. I have been in Auburn and Seattle for sixteen years. I have been in the employ of the Northern Pacific from September 1, 1910, until the latter part of 1917 as a brakeman. I have not been in their employ since 1917. I roomed at the St. Elmo Hotel conducted by Mrs. Lewis. I have roomed there since I came to Auburn. I know Mr. Lane. I worked with Thomas E. Jones. I never worked with Hanson, though I worked with Bellamy. I know Hanson to speak to him. I know Mrs. Jones and David Jones, and I know Mellison. My business is running automobiles for hire in Auburn. I am a licensed operator of automobiles for hire, and was in March, 1920. I met Ayers in Auburn on March 27th on the corner of First and Silver Street about eight o'clock at night. Ayers drove up in a car and asked me if I had seen conductor Scott, and I said that I had not. He said, "Well, I am looking for him. He was to do some work for me,—make a haul for me to night, and I don't seem to be able to find him." "Well," he says, "what are you doing?" I said, [155] "Doing nothing but standing here

(Testimony of Lemuel S. Fowler.)

talking now." He said, "Can I get you to make a drive for me to Renton?" And I said, "I guess you can. There is no reason why you cannot." He said, "I will see if I cannot find Scott, and if I cannot I will come back and get you." I said, "I will be here for a while," and I asked him what he wanted me to do. He said, "I have got some accessories I want hauled to Renton." I said, "What have you got?" He said, "Automobile tires." I says, "I haven't any automobile truck. I can't haul a load of tires. I have this little Paige Cloverleaf, and I can't get much in it." I was to be paid for hauling it. The regular price for a trip from Auburn to Renton is four dollars. I make the run frequently. I was talking to a fellow named Brown and a fellow named Allerdice, standing there on the corner. An hour later I saw Ayers and he told me he could not find Scott and wanted me to haul the tires for him, and I hauled the tires for him. I went with him about eight or nine o'clock up on Cemetery Hill. I was alone in my car and Ayers was alone in his car. Mellison was not there. We went up to the top of a hill to a house up there and we got the tires out of the house upstairs in a little loft in there. Ayers took me to the place. I did not know the tires were there before Ayers took me there. He stopped the machine in front of the place and lugged the tires out and I loaded them in the car. I knew nothing of the tires prior to the time Ayers said he wanted me to haul the tires to a garage at Renton. I have known Scott seven or eight years. Early in the evening between seven and

(Testimony of Lemuel S. Fowler.)

eight o'clock that night I had met Mr. Mellison. He was looking for some place to get some whiskey, and he asked me about it. His family had been sick. I had hauled him to the Northern Pacific Hospital [156] at Tacoma previous to this. Dr. Brandt, the company doctor, engaged me to haul him. I told him I did not know where there was any whiskey around there. After Ayers and I had loaded the tires I saw Mellison again on the street and I told him I was going to Renton, and Mr. Ayers had told me maybe he could get some whiskey. I had had a drink of whiskey with him out of a bottle he had in his car up on top of the hill. Ayers had told me he could get plenty of it in Renton. I offered to take Mellison to Renton with me, and I told him that Ayers would get the whiskey. He went and got his overcoat and came back and waited for me an hour or two in Auburn, and for Ayers to show up. Mellison had absolutely nothing to do with the tires. He was a passenger in the car; that is all. Mellison was going to Renton for whiskey. I waited on the highway 45 minutes or an hour for Ayers, and then I drove into Auburn looking for him. The automobile tires were in the car all the time from nine o'clock to twelve. I followed Ayers to Renton. Mr. Ayers and Mr. Ratcliff drove into the garage and unloaded some stuff out of their car, and backed out. As he backed out I drove in and unloaded the tires, and was arrested. I had a revolver in my pocket and also \$278. I generally carry a revolver when driving an automobile at night. A lot of jitney-bus men

(Testimony of Lemuel S. Fowler.)

have been knocked over all of the time, and some of them have been killed. Mr. Loveall took it out of my pocket. There was some shooting at the garage. I think the deputies did it. Deputy Sheriff Hughes and I unloaded the tires. I never offered to sell the tires to anybody. Nobody ever offered to sell them to me. I was questioned in the County Jail by Deputy Sheriffs Campbell and Loveall. When I was brought to the County Jail Deputy Sheriffs Campbell, Loveall and Hughes went out and said they were going to get this other fellow. They said they knew [157] who he was and they were going to get him. They returned in about three-quarters of an hour and said they had not found the man. Loveall told me he would kill me unless I told him who the man was that got away, and he started to beat me up. I have a mark on me at the present time. Campbell, Loveall and Hughes were present while he was beating me. Campbell said that the man took two shots at him and that the powder burnt his coat. Campbell said he would wear the handcuffs out over my head unless I would tell him who the man was. I did not see Ratcliff on March 26th until we landed in Renton.

Cross-examination.

I am thirty-nine years old.

Q. What has been your occupation?

A. I have been railroading for the last number of years.

Q. How long?

(Testimony of Lemuel S. Fowler.)

A. Why I was in the employ of the Northern Pacific from 1910 to 1917.

Q. You left the employ in 1917? A. Yes.

Q. Under conviction of theft from cars?

Mr. DORE.—I object to that as incompetent, irrelevant and immaterial.

The COURT.—You said “conviction”?

Mr. SAUNDERS.—Conviction.

The COURT.—Objection overruled.

Mr. DORE.—The only question open would be conviction of theft, I take it.

The COURT.—There is moral turpitude in conviction for larceny, whether it is grand or petit. But I instruct the jury that it only bears if the witness admits that he was convicted—it only bears on his credibility as a witness. [158]

Mr. SAUNDERS.—That is all it is offered for.

The COURT.—You are not to convict him in this case, because he may have committed some other offense. That is not right, and you are not allowed to do that. But a man who has been convicted of crime, you may take that into question in determining whether he is the sort of a man that would probably tell you the truth,—what he testifies as a witness. Objection overruled.

Q. You left the employ of the Northern Pacific as a brakeman when you were convicted of theft from box-cars?

A. Yes, I pleaded guilty to petit larceny.

Q. From box-cars? A. No, sir.

Q. From the railroad? A. No, sir.

(Testimony of Lemuel S. Fowler.)

Q. What from then?

A. For having the goods in my possession.

Q. They came from box-cars,—stolen goods? They came from box-cars. I am asking you, you plead guilty to having stolen goods in your possession? A. Yes, sir.

Q. That had been stolen from box-cars.

A. Yes, sir.

Q. You have not been in the railroad employ since then?

A. No, sir. I have lived at the St. Elmo Hotel. I left Auburn in July of last year. I worked in the Northwest Steel Company in Portland. I was also working in a garage in Sacramento, California. I was absent from Auburn a year and then returned. I know Lane, Bellamy and White and both of the Jones. I never roomed [159] at the Lloyd Hotel. I worked with Ratcliff and Creed Lane. I never worked with Hanson. I only worked with them while I was in the railroad employ. I never received any signal from Ayers that night.

Recross-examination.

I had no personal acquaintance with Ayers. I knew he was a man that had been in business in a garage in Auburn. I did not know he was a thief. As far as I knew, he was all right.

Testimony of James Mellison, One of the Defendants.

My name is James Mellison. I live in Auburn; am married and have five children. I was in the

(Testimony of James Mellison.)

Northern Pacific Hospital, in Tacoma. I went to the hospital on March 16th and left on March 27th. When I got home two of the children had the flu and the other three had the measles. In the hospital I had pneumonia and flu. I was attempting to get whiskey that night. The doctor in the hospital told me it would be good for me to have whiskey. I met Fowler that night on the main street of Auburn. He told me he could not tell me just then where I could find any whiskey. I met him again between 10 and 11 and he then said he knew where I could get some whiskey. He said a man had given him a drink, and he had a trip to make to Renton and if I would come down there I could get some good whiskey. I did not go up the hill with him and Fowler and I did not see the tires loaded in the car. The first time I saw the tires was when the automobile was standing by the curb. I never knew Ayers until I got to Renton. They never searched my house for stolen property. I work at switching and also at plumbing. I worked for Mr. Price, a plumber at Auburn. I never knew Mrs. Lewis before this trouble. I only saw Mrs. Jones here in court. I never saw Mr. Lane until in court. I do not know Tom Jones, Bellamy or any of the other defendants.

I knew Fowler around [160] Auburn. He drove me over to the Northern Pacific Hospital at Tacoma. He was hired by Dr. Brandt, the Northern Pacific doctor at Auburn. The following morning after I was arrested Mr. Winquist and Mr. Payne came to the jail with a stenographer and asked me if I could

(Testimony of James Mellison.)

tell them who was the man who escaped from the officers at Renton. I told them, "No, I could not. I never saw him before, and I am not sure if I would know him if I saw him again." Stewart Campbell came and asked me if I would talk to Mr. Payne. And he said if I would tell them what they wanted to know they would get me out of trouble. Payne wanted to know where Ayers was.

Cross-examination.

I told the story about the whiskey immediately after my arrest. I told it to Campbell, Loveall, Hughes and Taylor. My wife and a neighbor woman and the doctor was taking care of my family that night I heard Deputy Sheriff Hughes ask Fowler if there was any tubes, and Fowler said no. Ayers and Fowler had a dispute about paying for the hauling, outside of the garage. Fowler wanted Ayers to pay him for the trip and wanted to leave the stuff outside. I was walking around on the ground. I had forty dollars on me that night.

Testimony of Dr. Frank Brooks, for the Defense.

My name is Frank Brooks; I live in Auburn. I am a regularly licensed physician and surgeon, and my principal office is in Seattle. In the latter part of June I was in attendance upon the Mellison family. Mellison's daughter Mary had typhoid pneumonia, and the little boy had influenza.

Testimony of Mrs. Louise Mellison, for the Defense.

My name is Mrs. James Mellison. I am the wife of James Mellison, the defendant. I have five children. The eldest is [161] twelve years old and the youngest is three and a half. The family was sick the latter part of last March. The oldest girl was very sick and had typhoid pneumonia. My husband left home on March 27, 1920, to see if he could get some whiskey. The girl was practically dying. He came back about eight-thirty and had no whiskey with him. He went out about eleven and said he was going to Renton for whiskey. I was the one that wanted him to get the whiskey. The next I heard of him he was in jail. My husband works as a switchman and as a plumber.

Testimony of C. E. Allerdice, for the Defense.

I live in Auburn, Washington. I am a switchman. On the streets of Auburn on March 27th I heard Ayers and Fowler talking. I was talking to Fowler when Ayers drove up in the automobile. Ayers called to Fowler and asked him if he had seen Scott. Fowler said, "No." Ayers then asked Fowler if he had a car, and he told Fowler he had a trip he wanted him to make. He was figuring on Scott making the trip, and he wanted to know if Fowler could make it. He said he would. He got out and they were talking, and I told him as long as he was going to get busy, I would go on. Ayers said the trip was to Renton Junction. Brown was there at the time.

(Testimony of C. E. Allerdice.)

Cross-examination.

I have known Fowler about two and a half years. I knew him as a jitney driver. I know Tom Jones, David Jones. I do not know Sarah Jones. I know Mrs. J. R. Lewis. I know J. R. Mellison. I am not acquainted with White. I know Clarence H. Bellamy. I know Hanson and I have met his wife. I know Creed Lane and Thomas E. Jones.
[162]

Testimony of J. E. Price, for the Defense.

My name is J. E. Price. I am in the plumbing business in Auburn. I know Mellison. He has been in my employ as a plumber from the latter part of May until along about the 18th of October, 1919. He was working at switching also at the time. His reputation in Auburn for honesty and good citizenship is good.

Testimony of A. C. Hubbard, for the Defense.

My business is jitney driver. I live in Auburn. I know Ayers. Ayers asked me at one time if I knew of anybody that wanted any tires.

Mr. GRAVES.—If your Honor please, the defendant Bellamy rests upon the evidence already received.

Defendant's Exhibit "J," a letter offered in evidence and read: "Auburn, February 9th. Mr. J. H. Robinson, Trainmaster. Someone went through the caboose in Auburn yards February 5th and stole my clothes including my pass and switch key. Will

you please send a new one? Yours truly, Creed Lane, Brakeman."

Marked "Received, February 10th," with the stamp of the trainmaster.

Mr. TUCKER.—May it please your honor, on behalf of the defendant, Thomas Singer, at this time, I move the Court to direct the jury to return a verdict of not guilty in favor of the defendant as to Count 1. I move the Court to direct the jury to return a verdict of not guilty on Count 2, and I move the Court to direct the jury to return a verdict of not guilty on Count 3, because of entire lack of any evidence. The defendant has made an explanation as to how he came into possession of the overcoat. The most unfavorable construction that [163] could be placed upon this evidence against the defendant Singer is that he was in possession of property that at one time was stolen.

Motion denied and exception allowed.

Motion on behalf of defendant Clarence H. Belamy for directed verdict. Motion overruled and exception allowed.

Motion for directed verdict on behalf of defendant Sarah Jones. Motion denied.

Motion for directed verdict on behalf of Ethyl Hanson, and motion for directed verdict on behalf of defendant W. H. Hanson. Motion on behalf of David Jones. All of these motions were denied and exceptions allowed.

Motion for directed verdict on behalf of defendants L. S. Fowler, James Mellison and Mrs. Sarah

Jones on Count 1, Count 2 and Count 3 of the indictment, on the ground that there was lack of evidence as to each of them, and that there was not sufficient evidence to sustain any one count of the indictment.

The motions as to each of the defendants were overruled and exceptions allowed.

JOHN F. DORE,

Attorney for Thomas Singer and Lemuel S. Fowler.

[164]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEMUEL S. FOWLER, THOMAS SINGER et al.,
Defendants.

Order Settling Bill of Exceptions.

Defendants Lemuel S. Fowler and Thomas Singer, having tendered and presented the foregoing as their bill of exceptions in this cause to the action of the court, and in furtherance of justice and that right may be done, and having prayed that the same may be settled and allowed, authenticated, signed and sealed by the Court and made a part of the record herein; and the Court having considered said bill of exceptions and all objections and proposed amendments made thereto by the Govern-

ment, and being now fully advised, does now in furtherance of justice, and that right may be done the defendants, sign, seal, settle and allow said bill of exceptions as the bill of exceptions in this cause, and it is ORDERED that the same be made a part of the record herein.

And the Court further certifies that each and all of the exceptions taken by the defendant, as shown in said bill of exceptions, were at the time the same were taken allowed by the Court.

And the Court further certifies that said bill of exceptions contains all the evidence in said cause, and also everything material to each and every assignment of error made by the defendants and tendered and filed in this cause with said bill of exceptions.

And the Court further certifies that said bill of exceptions was filed and presented to the Court within the time provided by law, as extended by [165] the order heretofore made herein.

Done and ordered in open court, counsel for the Government and defendants being present, this 18th day of Oct., 1920.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Bill of Exceptions. Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 18, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [166]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEMUEL S. FOWLER, THOMAS SINGER et al.,
Defendants.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please make a transcript of record on
appeal to the Circuit Court of Appeals for the
Ninth Circuit, in the above-entitled cause, and in-
clude therein the following:

Indictment.

Arraignment.

Demurrer.

Order overruling demurrer.

Plea.

Record of trial and impanelling jury.

Motion for directed verdict.

All of motions.

Order granting some and overruling others.

Motion for directed verdict at end of Government's
case.

Order overruling same.

Verdict.

Motion for new trial—Singer.

Motion for new trial—Fowler.

Hearing on motion for new trial—Singer and Fowler.

Judgment and sentence—Fowler and Singer.

Petition for writ of error—Singer and Fowler.

Assignment of error—Singer and Fowler.

Order allowing writ of error—Singer and Fowler.

Supersedeas—Fowler and Singer.

All orders extending time for filing bill of exceptions.

All orders extending time for filing records.

Bill of exceptions.

Order settling bill of exceptions.

Writ of error.

Citation.

Defendant's praecipe.

JOHN F. DORE,

Attorney for Defendants Lemuel S. Fowler and Thomas Singer. [167]

We waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this Court.

JOHN F. DORE,

Attorney for Plaintiff in Error.

[Indorsed]: Praecipe for Transcript of Record. Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 28, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [168]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEMUEL S. FOWLER and THOMAS SINGER,
Defendants.

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court, for the Western District of Washington, do hereby certify this typewritten transcript of record numbered from 1 to 168, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to said writs of error herein from the judgments of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees

and charges incurred and paid in my office by or on behalf of the plaintiffs in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [169]

Clerk's fee (Sec. 828, R. S. U. S.) for making record, certificate or return, 282

folios at 15¢.....\$63.45

Certificate of clerk to transcript of record—

4 folios at 15¢..... .60

Seal to said certificate..... .20

I hereby certify that the above cost for preparing and certifying record, amounting to \$64.25, has been paid to me by attorney for plaintiffs in error.

I further certify that I hereto attach and herewith transmit the original writs of error and original citations issued in this cause.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 9th day of November, 1920.

[Seal]

F. M. HARSHBERGER,
Clerk U. S. District Court. [170]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

LEMUEL S. FOWLER,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Writ of Error (Lemuel S. Fowler).

The United States of America,—ss.

The President of the United States of America, to
the Honorable Judges of the District Court of
the United States for the Western District of
Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in
the rendition of the judgment, of a plea which is in
said District Court before the Honorable Edward
E. Cushman, one of you, between Lemuel S. Fowler,
the plaintiff in error, and the United States of
America, the defendant in error, a manifest error
hath happened to the prejudice and great damage
of said plaintiff in error, as by his complaint and
petition herein appears, and we being willing that
error, if any hath been, should be duly corrected
and full and speedy justice done to the party afore-
said in this behalf, do command you, if judgment
be therein given, that then, under your seal, dis-
tinctly and openly, you send the record and pro-
ceedings with all things concerning the same, to the
United States Circuit Court of Appeals for the
Ninth Circuit, at the city of San Francisco, State
of California, together with this writ, so that you
have the same at said city of San Francisco within
thirty days from the date hereof, in the said Cir-
cuit Court of Appeals to be then and there held,
that the record and proceedings aforesaid being
then and there inspected, said Court of Appeals
may cause further to be done therein to correct that
error, what of right and according to the laws and

the rendition of the judgment, of a plea which is in said District Court before the Honorable Edward E. Cushman, one of you, Thomas Singer, the plaintiff in error, and the United States of America, the defendant in error, a manifest error hath happened to the prejudice and great damage of said plaintiff in error, as by his complaint and petition herein appears, and we being willing that error, if it hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, together with this writ, so that you have the same at said city of San Francisco within thirty days from date hereof, in said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being then and there inspected, said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America [173] should be done in the premises.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 21st day of June, 1920, and the year of the Independence of the United States one hundred and forty-third.

[Seal] F. M. HARSHBERGER,
Clerk of the District Court of the United States for
the Western District of Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 21, 1920. F. M. Harshberber, Clerk. By S. E. Leitch, Deputy. [174]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEMUEL S. FOWLER, GEORGE E. WHITE,
CLARENCE H. BELLAMY, ALBERT
BRUCE PARIS, THOMAS E. JONES,
EDWARD BOURDELL, SARAH JONES,
JOE VEAGUS, HERBERT WILLIAM
HANSON, ETHYL HANSON, WILLIAM
RATCLIFF, JAMES FRANCIS MELLI-
SON, THOMAS SINGER, DAVID JONES,
CREED LANE, GEORGE H. TREPA-
NIER and MRS. J. A. LEWIS,

Defendants.

Citation on Writ of Error (Lemuel S. Fowler).

United States of America,—ss.

The President of the United States of America, to
the United States of America, and to Robert
C. Saunders, United States Attorney for the
Western District of Washington, Northern
Division, GREETING:

You are hereby cited and admonished to be and

appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein said Lemuel S. Fowler is plaintiff in error and the United States of America is defendant in error, to show cause, if any there be, why judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the party in that behalf.

WITNESS, the Honorable EDWARD E. CUSHMAN, Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 21st day of June, 1920.

EDWARD E. CUSHMAN,
United States District Judge.

[Seal] Attest: F. M. HARSHBERGER,
Clerk of the District Court of the United States for
the Western District of Washington.

Acceptance of service of within Citation acknowledged this 21st day of June, 1920.

ROBT. C. SAUNDERS,
Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 21, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [175]

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LEMUEL S. FOWLER, GEORGE F. WHITE,
CLARENCE H. BELLAMY, ALBERT
BRUCE PARIS, THOMAS E. JONES,
EDWARD BOURDELL, SARAH JONES,
JOE VEAGUS, HERBERT WILLIAM
HANSON, ETHYL HANSON, WILLIAM
RATCLIFF, JAMES FRANCIS MELLI-
SON, THOMAS SINGER, DAVID JONES,
CREED LANE, GEORGE H. TREPA-
NIER and MRS. J. A. LEWIS,
Defendants.

Citation on Writ of Error (Thomas Singer.)

United States of America,—ss.

The President of the United States of America, to
the United States of America, and to Robert
C. Saunders, United States Attorney for the
Western District of Washington, Northern
Division, GREETING:

You are hereby cited and admonished to be and
appear before the United States Circuit Court of
Appeals for the Ninth Circuit, at San Francisco,
in the State of California, within thirty days from
the date hereof, pursuant to a writ of error filed

in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein said Thomas Singer is plaintiff in error and the United States of America is defendant in error, to show cause, if any there be, why judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the party in that behalf.

WITNESS, the Honorable EDWARD E. CUSHMAN, Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 21st day of June, 1920.

EDWARD E. CUSHMAN,

United States District Judge.

[Seal] Attest: F. M. HARSHBERGER,
Clerk of the District Court of the United States for
the Western District of Washington.

Acceptance of service of within Citation acknowledged this 21st day of June, 1920.

ROBT. C. SAUNDERS,

Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 21, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [176]

[Endorsed]: No. 3597. United States Circuit Court of Appeals for the Ninth Circuit. Lemuel S. Fowler and Thomas Singer, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writs of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed November 12, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LEMUEL S. FOWLER et al.,
Defendants.

**Order Extending Time to and Including November
20, 1920, for Filing Record.**

For good cause now shown to this Court, it is hereby ORDERED that the time for filing the record in the Circuit Court of Appeals in the above-entitled cause be and the same hereby is extended to November 20th, 1920.

Done in open court, this 18th day of October,
1920.

EDWARD E. CUSHMAN,
United States District Judge.

O. K.—ROBT. C. SAUNDERS,
U. S. Dist. Atty.

[Endorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division. Oct. 18, 1920. F. M. Harshberger, Clerk.
By S. E. Leitch, Deputy.

United States District Court, Western District of
Washington, Northern Division.

No. 5249.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LEMUEL S. FOWLER, GEORGE E. WHITE,
CLARENCE H. BELLAMY, ALBERT
BRUCE PARIS, THOMAS E. JONES,
JOE VEAGUS, EDWARD BOURDELL,
SARAH JONES, HERBERT WILLIAM
HANSON, ETHYL HANSON, WILLIAM
RATCLIFF, JAMES FRANCIS MELLI-
SON, THOMAS SINGER, DAVID JONES,
CREED LANE, GEORGE H. TREPA-
NIER and MRS. J. A. LEWIS,
Defendants.

**Order Extending Time to and Including October 20,
1920, for Filing Record.**

FOR GOOD CAUSE SHOWN it is ORDERED, that the time for filing the record in the above-entitled cause in the office of the clerk of the Circuit Court of Appeals be and the same hereby is extended to October 20th, 1920.

Done in open court, this 20th day of September, 1920.

JEREMIAH NETERER,
United States District Judge.

O. K.—F. R. CONWAY,
Asst. U. S. Atty.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 20, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 5249.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LEMUEL S. FOWLER, GEORGE E. WHITE,
CLARENCE H. BELLAMY, ALBERT
BRUCE PARIS, THOMAS E. JONES,
EDWARD BOURDELL, SARAH JONES,

JOE VEACUS, HERBERT WILLIAM HANSON, ETHYL HANSON, WILLIAM RATCLIFF, JAMES FRANCIS MELLISON, THOMAS SINGER, DAVID JONES, CREED LANE, GEORGE H. TREPANIER and MRS. J. A. LEWIS,

Defendants.

Order Extending Time Sixty Days from July 20, 1920, for Filing Record.

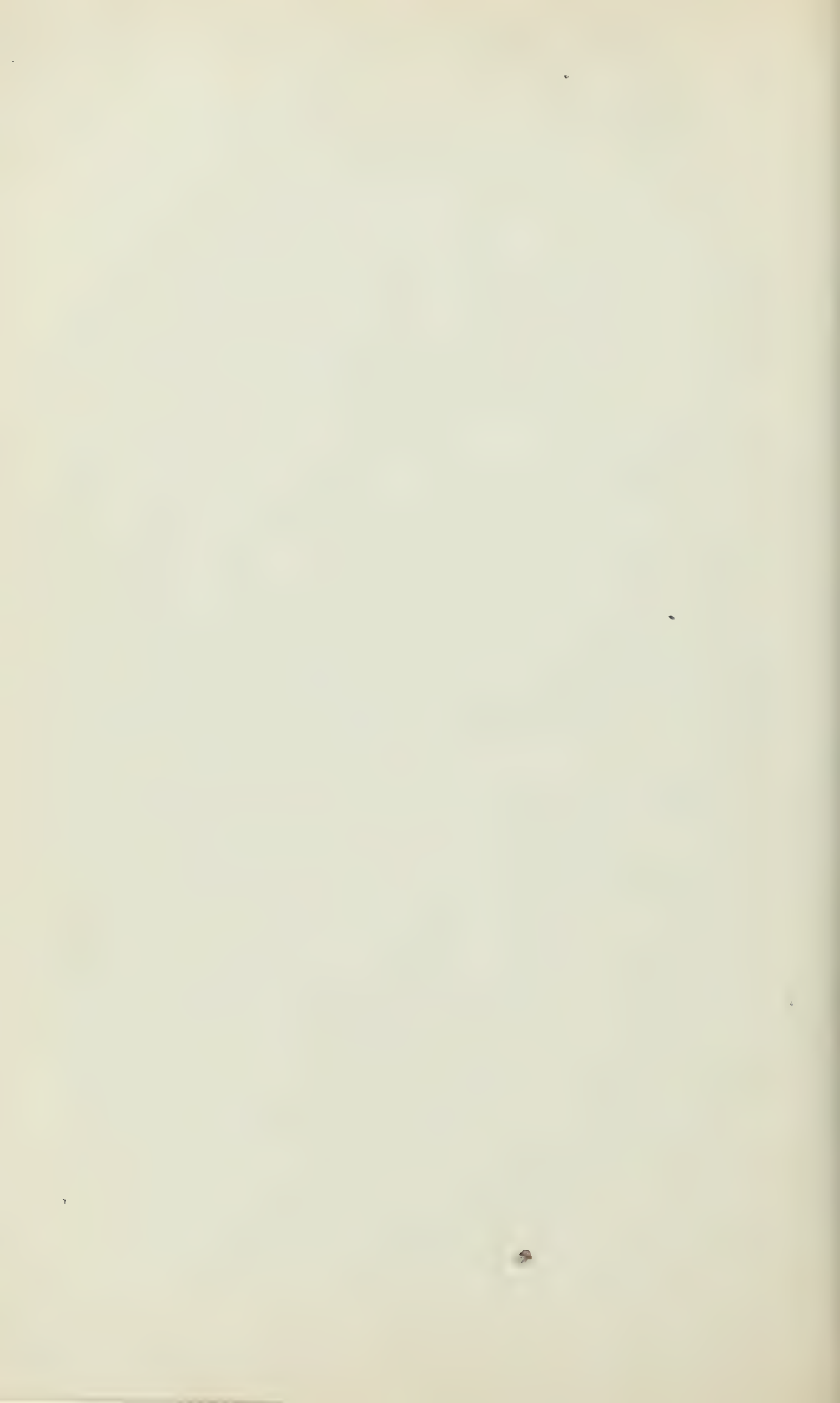
FOR GOOD CAUSE NOW SHOWN, it is hereby ORDERED that the time for filing the record in the above cause in the office of the clerk of the United States Circuit Court for the Ninth Circuit be and the same hereby is extended for sixty (60) days from the 20th day of July, 1920.

Done in open court, this 19th day of July, 1920.

FRANK H. RUDKIN,
United States District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 19, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

No. 3597. United States Circuit Court of Appeals for the Ninth Circuit. Three Orders Under Subdivision 1 of Rule 16 Enlarging Time to and Including November 20, 1920, to File Record and Docket Cause. Filed Nov. 12, 1920. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.



No. 3597

**United States Circuit Court
of Appeals**

LEMUEL S. FOWLER AND THOMAS SINGER,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA
Defendant in Error.

Upon Writ of Error to the United States District
Court of the Western District of Washington,
Northern Division.

BRIEF OF PLAINTIFFS IN ERROR

JOHN F. DORE,
of Seattle, Washington,
Attorney for Plaintiffs in Error.

J. L. Macdonald Company, Printers and Publishers, Seattle.

FILED

FEB 10 1921

F. D. MONTGOMERY

No. 3597

United States Circuit Court of Appeals

For the Ninth Judicial Circuit

LEMUEL S. FOWLER AND THOMAS SINGER,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA
Defendant in Error.

STATEMENT OF THE CASE

Plaintiffs in Error, Lemuel S. Fowler and Thomas Singer, were on June 7, 1920, found guilty on an indictment charging conspiracy in three counts. Judgment was passed upon each defendant that he serve a sentence of eighteen months in the Federal Penitentiary at McNeils Island, Washington, and pay a fine of \$500 on each count, the sentence of eighteen months on each count to be served concurrently and the fine of \$500 on each count to be paid as imposed,

which said goods and chattels, prior to said buying, receiving, concealing, and possessing by the said conspirators as aforesaid had been and would have been knowingly, wilfully, unlawfully, and feloniously stolen, taken, carried away and obtained by fraud and deception from certain railroad cars, railroad station-houses, railroad platforms, and railroad depots, with the intent then and there on the part of such person so stealing, taking, carrying away and obtaining said goods and chattels to convert the said goods and chattels to his own use, and the said goods and chattels when so stolen, taken, carried away and obtained, being then and there moving as and part of and constituting certain interstate and foreign shipments of freight and express, that they, the said conspirators, and each of them, then and there well knew and would and should well know at the times of buying, receiving and possessing said goods and chattels as aforesaid that the said goods and chattels had heretofore been stolen.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said Thomas E. Jones, Creed Lane, Edward Bourdell and Clarence H. Bellamy and each of them on the 25th day of January, 1920,

did knowingly, wilfully, unlawfully and feloniously, in the Northern Division of the Western District of Washington, ride upon and accompany that certain railroad train from Ellensburg to the town of Auburn, containing as a part thereof a certain railroad car known as and bearing initials and number C. P. & St. L. 4188, then and there operated on the railroad route and transportation system of the Northern Pacific Railway Company under Federal control.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said Thomas E. Jones and Creed Lane, on, to wit, the 31st day of July, 1919, did then and there ride upon and accompany from Ellensburg to the town of Auburn in the Northern Division of the Western District of Washington, that said railroad train then and there including as a part thereof that certain railroad car known as and bearing initials and number N. P. 31800, upon and over the route and transportation system of Northern Pacific Railway Company then and there under Federal control.

That after the formation of said conspiracy, and in pursuance thereof, and in order to effect the object of said conspiracy, the said Thomas E. Jones, Edward Bourdell, Clarence H. Bellamy and Creed

ing interstate or foreign shipments, the unlawful entering of such cars, the stealing of freight and express packages or baggage or articles in process of transportation in interstate shipment, and the felonious asportation of such freight or express packages or baggage or articles therefrom into another district of the United States, and the felonious possession or reception of the same," it being then and there the plan, purpose and object of said conspiracy and of the said conspirators, that they, the said conspirators, should and would knowingly, willfully, unlawfully and feloniously break the seals of said railroad cars containing interstate and foreign shipments of freight and express with the unlawful and felonious intent then and there on the part of the conspirators, and each of them, to commit larceny in said certain cars; it being then and there the further plan, purpose and object of the said conspiracy, and of the said conspirators, that they, the said conspirators, and each of them should and would knowingly, wilfully and unlawfully enter certain railroad cars then and there containing interstate and foreign shipments of freight and express with the unlawful and felonious intent then and there on the part of the said conspirators, and each of them, to commit larceny in said cars; and it

being then and there the further plan, purpose and object of the said conspiracy, and of the said conspirators, that they the said conspirators should and would knowingly, wilfully, unlawfully and feloniously steal, take, carry away and conceal, and by fraud and deception obtain from certain railroad cars, railroad stationhouses, railroad platforms and railroad depots, with the unlawful and felonious intent then and there on the part of said conspirators, and each of them, to convert to the on use of said conspirators and each of them ,certain goods and chattels, of value then and there moving as interstate and foreign shipments of freight and express, and then and there being a part of and constituting interstate and foreign shipments of freight and express, all as the said conspirators then and there well knew and should and would well know at the time and in the execution of the said conspiracy and the object thereof; it being then and there the further purpose, plan and object of the said conspiracy and of the said conspirators, and each of them, would and should know-
spirators, that they, the said conspirators, and each of them, would and should knowingly, wilfully, unlawfully, and feloniously, buy, receive, conceal and have in the possession of the said conspirators, and each of them, certain goods and chattels,of value.

making an aggregate fine to be paid of \$1500.00.

The plaintiffs in error within the time limited by law moved for a new trial, which motion was by the Court overruled and exception thereto allowed, and likewise, within said time filed a motion for arrest of judgment, which was also denied. A Writ of Error was granted, bringing the case to this court.

Those indicted on each count as conspirators were: Lemuel S. Fowler, George E. White, Clarence H. Bellamy, Albert Bruce Paris, Thomas E. Jones, Edward Bourdell, Sarah Jones, Joe Veagus, Herbert William Hanson, Ethyl Hanson, William Ratcliff. James Francis Mellison, Thomas Singer, David Jones, Creed Lane, George H. Trepanier and Mrs. J. A. Lewis.

Before the cause was submitted to the jury the trial judge directed a verdict of not guilty for George H. Trepanier, Joe Veagus and Albert Bruce Paris. The jury returned a verdict of guilty against Edward Bourdell, a judgment, however, was not passed upon him, as he committed suicide during the trial. All the other thirteen defendants, whose case was submitted to the jury were acquitted with the exception of Lemuel S. Fowler, Thomas Singer, the plaintiffs in error herein and Creed Lane and Her-

bert William Hanson.

The indictment, omitting the caption was as follows:

COUNT I.

That on, to wit, the 30th day of March, 1918, and Continuously thereafter to the time of the presentment of this indictment, at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, Lemuel S. Fowler, George E. White, Clarence H. Bellamy, Albert Bruce Paris, Thomas E. Jones, Edward Bourdell, Sarah Jones, Joe Veagus, Herbert William Hanson, Ethyl Hanson, Creed Lane, William Ratcliff, James Francis Mellison, Thomas Singer, David Jones, George H. Trepanier and Mrs. J. A. Lewis, have knowingly, wilfully, unlawfully, corruptly and feloniously combined, conspired, confederated and agreed together, and one with the other and together, and with divers other persons to the grand jurors unknown, all of the said defendants herein above named, and said other persons unknown being hereinafter called the conspirators, to commit an offense against the United States, that is to say, to violate Section 1 of the Act of Congress approved February 13th, 1913, entitled "An Act to punish the unlawful breaking of seals of railroad cars contain-

Lane did knowingly, willfully, unlawfully and feloniously ride upon and accompany from Auburn, in the Northern Division of the Western District of Washington, to Ellensburg, that certain train then and there including as a part thereof that certain car known as and bearing initials and number N. P. 96,333, then and there moving upon and along the route and transportation system of the Northern Pacific Railway Company, then and there under Federal control.

That after the formation of said conspiracy, and in pursuant thereof, and in order to effect the object thereof, the said Thomas E. Jones and Creed Lane on the 12th day of February, 1920, at Auburn, in the Northern Division of the Western District of Washington, did then and there knowingly, willfully, unlawfully, and feloniously approach and examine that certain railroad car known as and bearing initials and number C. B. & Q. 38,573, which said car then and there was included and a part of a railway train being and about to be moved and operated over the railroad route and transportation system of the Northern Pacific Railway Company, then and there under Federal control.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the ob-

ject thereof, the said Creed Lane on the 6th day of February, 1920, at Auburn, in the Northern Division of the Western District of Washington, did then and there knowingly, wilfully, unlawfully and feloniously enter that certain railroad car known as and bearing initials N. P. 96,333, then and there being included in and a part of that certain train then and there being moved and operated in the railroad route and transportation system of the Northern Pacific Railway Company, then and there under Federal control.

That after the formation of said conspiracy, and in pursuance thereof, and in order to effect the object hereof, said Thomas E. Jones on the 12th day of February, 1920, did knowingly, wilfully, unlawfully and feloniously ride upon and accompany from Ellensburg to Auburn, in the Northern Division of the Western District of Washington, that certain train including as a part thereof that certain car known as and bearing initials and number M. C. 61,880, then and there being moved and operated upon the railroad route and transportation system of the Northern Pacific Railway Company, then and there under Federal control.

That after the formation of said conspiracy, and in pursuance thereof, and in order to effect the object

thereof, the said Thomas E. Jones and the said Joe Veagus at East Auburn, in the Northern Division of the Western District of Washington, on the 24th day of February, 1920, did then and there knowingly wilfully, unlawfully and feloniously talk and converse together.

That after the formation of the said conspiracy, and in pursuance thereof, and in order to effect the object thereof, the said Creed Lane, on the 17th day of February, 1920, at Auburn, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, did then and there knowingly, willfully, unlawfully and feloniously possess and conceal certain articles goods, wares and merchandise theretofore feloniously stolen from certain railroad cars while moving as and constituting parts of interstate and foreign shipments of freight and express, to wit, six overcoats, hosiery, one shotgun, shirts, shoes, cotton goods, cotton gloves, electric caps, phonographs, records, cigarettes and other articles, a more particular description thereof being to the grand jurors unknown.

That after the formation of the said conspiracy, and in pursuance thereof, and in order to effect the object thereof the said George E. White, on the 25th day of February, 1920, at Auburn, in the Northern

Division of the Western District of Washington, did then and there knowingly, wilfully, unlawfully and feloniously possess and conceal certain articles, goods, wares and merchandise theretofore feloniously stolen from a railroad car moving in interstate commerce and being and constituting a part of an interstate shipment of freight, to wit, one certain man's overcoat, shoes, neckties, padlocks, three bottles of Jergin's lotion, benzoin, men's shirts, razor strops and other goods and chattels, a more particular description whereof is to the grand jurors unknown.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, the said Clarence H. Bellamy, on the 25th day of February, 1920, at Auburn, in the Northern Division of the Western District of Washington, did then and there knowingly, wilfully, unlawfully and feloniously possess and conceal certain goods, chattels, wares and merchandise theretofore feloniously stolen from a railroad car, railroad station-house, railroad platform and railroad depot, while moving as and constituting a part of an interstate shipment of freight and express, to wit, men's shoes, together with other articles, goods, merchandise, and chattels, a more particular description whereof is to the grand jurors unknown.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, the said Albert Bruce Paris, on the 25th day of February, 1920, at Auburn, in Northern Division of the Western District of Washington, did then and there knowingly, wilfully, unlawfully and feloniously have, possess and conceal certain chattel goods, wares and merchandise theretofore feloniously stolen from certain railroad cars, railroad station-houses, railroad platforms and railroad depots, while moving goods, wares, merchandise and chattels, a more particular description whereof is to the grand jurors unknown.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, the said Thomas E. Jones, on the 25th day of February, 1920, at Auburn, in the Northern Division of the Western District of Washington did then and there knowingly, wilfully, unlawfully, and feloniously possess and conceal certain goods, wares, merchandise and chattels theretofore feloniously stolen from certain railroad cars, railroad station-houses, railroad platforms and railroad depots, while moving as and constituting a part of an interstate shipment of freight and express, to wit, canvas

gloves, one hundred Mazda electric light bulbs, canned goods, whiskey bottles, bacon, grain in sacks and one sack of sugar, together with other goods, chattels, wares and merchandise, a more particular description whereof is to the grand jurors unknown.

That after the formation of the said conspiracy and in pursuance thereof, and in order to effect the object thereof, the said Edward Bourdell, on the 25th day of February, 1920, at Auburn in the Northern Division of the Western District of Washington, did then and there knowingly, wilfully and unlawfully and feloniously have, possess and conceal certain goods, chattels, wares and merchandise theretofore feloniously stolen from certain railroad cars, railroad station-houses, railroad platforms and railroad depots, while moving as and constituting a part of an interstate shipment of freight and express, to wit, certain razor strops, together with other goods, wares, merchandise and chattels, a more particular description whereof is to the grand jurors unknown.

That after the formation of said conspiracy, and in pursuance thereof, and in order to effect the object thereof, the said Sarah Jones, on the 25th day of February, 1920, at Auburn, within the Northern Division of the Western District of Washington, did then and there knowingly, wilfully, unlawfully and

feloniously have, possess, and conceal certain goods, wares, merchandise and chattels, theretofore feloniously stolen from certain railroad cars, railroad station-houses, railroad platforms and railroad depots, while moving as and constituting a part of interstate shipments of freight and express, to wit: certain shoes and dress goods, together with other goods, wares, merchandise and chattels, a more particular description whereof is to grand jurors unknown.

That after the formation of said consipracy and in pursuance thereof, and in order to effect the object thereof, the said Mrs. J. A. Lewis (whose true Christian name is to the grand jurors unknown), on the 29th day of March, 1920, at the St. Elmo Hotel, at the city of Auburn, in the Northern Division of the Western District of Washington, at 2 o' clock A. M. arose and came down to the front door in her wrapper to answer an enquiry made of her then and there by one William Ratcliff, when and where and under these circumstances the following conversation took place between the said Mrs. J. A. Lewis and the said William Ratcliff; William Ratcliff said, "Mrs. Lewis, where is Fowler? Why didn't he meet us as agreed?" Mrs. Lewis replied, "He is up at Cemetery Hill getting those auto tires, and should be back any

time." Mrs. Lewis then asked William Ratcliff, "Do you know the man you are dealing with over these tires?" Ratcliff replied, "I know him and know he is all right," Mrs. Lewis said, "How do you know he is all right?" Ratcliff replied, "He was sent in to me by a friend who told me this man was O. K."

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, the said Mrs. J. A. Lewis (whose true Christian name is to the grand jurors unknown) on the 30th day of March, 1920, at the residence of Mrs. Maud Ratcliff, 111 South Maude Street, at the city of Auburn, in the Northern Division of the Western District of Washington, spoke concerning the trouble the boys were in over the auto tires and mentioned Lemuel S. Fowler, William Ratcliff and Herbert William Hansen and their trip over the auto tires and their cases of shoes, and then said: "Had I looked out my front door when Mr. Ratcliff came to my hotel at 2 o'clock Sunday morning and asked for Fowler, and why he had not met them, and when I said that he had gone for the auto tires, had I seen the man that was in the automobile I could have told then and there that the man was dangerous and that it was foolish for them to have any business

transactions with him in any manner."

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, the said Mrs. J. A. Lewis (whose true Christian name is to the grand jurors unknown), on the 2nd day of April, 1920, at the St. Elmo Hotel, in the city of Auburn, in the Northern Division of the Western District of Washington, did then and there knowingly, wilfully, unlawfully and feloniously possess and conceal six (6) steak knives theretofore stolen and known to so have been stolen by the said Mrs. J. A. Lewis from a shipment contained in G. N. freight-car 211,470, consigned to Wells Butcher Supply Co., Seattle, State of Washington, from Russel Cutlery Co., Turner Falls, State of Massachusetts.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, the said Thomas E. Jones, and Edward Bourdell, being there and then members of the train crew handling and hauling freight car, G. N. 211,470 in train Extra West, arriving at Auburn, in the Northern Division of the Western District of Washington, on March 26, 1920, did then and there knowingly, wilfully, unlawfully and feloniously possess and conceal certain articles, goods, wares, and mer-

merchandise theretofore feloniously stolen from that certain last above mentioned freight railroad car while moving as and constituting part of interstate shipments of freight and express, to wit, one suit, man's grey and brown mixed, constituting part of a shipment moving in interstate commerce from Baltimore, Maryland, to Seattle, Washington, and consigned to Lundquist-Lilly Co.; also divers and sundry cutlery theretofore stolen and known so to have been by said defendants Thomas E. Jones and Edward Bourdell and George H. Trepanier from a shipment contained in the aforesaid G. N. freight-car 211,470, consigned to Well, Butcher Supply Co., Seattle, Washington from Russell Cutlery Co., Turner Falls, Mass.; also four new adjustable auto wrenches theretofore stolen as aforesaid from said interstate shipment ; also one new four pane widow sash, boxed, from and out of said interstate shipment contained in said car; also one brown mixed goods Mackinaw; also various and sundry men's caps, hats, grain sacks and other haberdashery, merchandise and groceries so stolen as aforesaid from and out of said shipments; also boots and shoes theretofore stolen from said interstate shipments moving in interstate commerce on and upon said railroad; all of which said divers and sundry goods and wares

and merchandise were each and severally found in the caboose 1850 attached to said interstate trains, G. N. 211,470, then and there in charge of Conductor Thomas E. Jones, and Brakeman Edward Bourdell.

That after the formation of said conspiracy and in pursuance thereof and in order to effect the object thereof, the said Thomas Singer on the 26th day of March, 1920, at Seattle, in the Northern Division of the Western District of Washington, did then and there knowingly, wilfully, unlawfully and feloniously receive, possess and conceal two suits of men's clothing from the defendant Edward Bourdell, theretofore feloniously stolen from a certain railroad car while moving as and constituting part of interstate and foreign shipments of freight and express, to wit, G. N. freight-car 211,470 carrying one case men's suits consigned to Lundquist-Lilly Co., Seattle, Washington, from L. Greiff & Bros., Baltimore, Maryland.

That after the formation of the said conspiracy and in pursuance thereof and in order to effect the object thereof, the said Thomas Singer did on the 29th day of February, 1920, at Seattle, Washington, knowingly, wilfully, unlawfully and feloniously receive and possess one man's overcoat from defend-

ant Bourdell, he the said Thomas Singer well knowing that the same had theretofore been stolen from goods moving in interstate commerce shipments, to wit, from and out of C. P. & St. L. freight-car 4188, containing a shipment of men's overcoats consigned from Hart, Schaffner & Marx to M. Prager & Co., Seattle, Washington.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, the said Edward Bourdell did knowingly, wilfully, unlawfully and feloniously on March 1, 1920, go to, visit and see the said defendant Thomas Singer at his place of business at 304 Denny Building, Seattle, Washington.

That after the formation of said conspiracy, and in pursuance thereof, and in order to effect the object thereof, the said Thomas Singer did on the first day of March, 1920, knowingly, wilfully, unlawfully and feloniously offer to buy and negotiate for certain goods, wares and merchandise from the said defendant Edward Bourdell, knowing the same to have lately theretofore been stolen from interstate commerce shipments.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the ob-

ject thereof, the said Clarence H. Bellamy, Thomas E. Jones, Herbert William Hanson, Lemuel S. Fowler and Edward Bourdell did on the 16th day of April, 1920, at Auburn in the Northern Division of the Western District of Washington, then and there knowingly, wilfully, unlawfully and feloniously meet and confer together in a certain room in the Lloyd Hotel.

That after the formation of the said conspiracy and in pursuance thereof, and in order to effect the thereof object, the said Herbert William Hanson, William Ratcliff and David Jones, did knowingly, wilfully, unlawfully and feloniously on February 28, 1920, enter railroad freight-car P. F. E. 12,320, then and there moving in interstate commerce for the Northern Pacific Railway Company, in said Northern Division of the Western District of Washington, containing a shipment of interstate commerce of shoes consigned by Peters Shoe Co., St. Louis, Mo., to J. H. Taylor, Seattle Washington, and knowingly, wilfully, unlawfully and feloniously remove from said car four cases of said shoes, the whole of said shipment and destroy the way-bill under which the said shipment was moving, and hide and conceal said shoes at a point at Mile Post 91, in King County,

Washington, and about one hundred yards from the railroad right of way.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, Herbert William Hanson, William Ratcliff and David Jones on the 2nd day of March, 1920, wilfully, knowingly, unlawfully and feloniously entered that certain railway freight-car, Penn car 43,493, and stole, took and carried away therefrom three rolls of grass matting, theretofore shipped from China in foreign commerce to St. Paul, Minnesota, over the Northern Pacific Railway.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, William Ratcliff, did knowingly, wilfully, unlawfully and feloniously on the 4th day of March, 1920, possess and conceal in his house at Auburn, in the Northern Division of the Western District of Washington of Washington, two rolls grass matting, well knowing that the same had been theretofore feloniously stolen from a railroad car moving in foreign commerce.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, Herbert William Hanson, did knowing-

ly, wilfully, unlawfully and feloniously on the 4th day of March, 1920, possess and conceal in his house at Auburn, in the Northern Division of the Western District of Washington, one roll grass matting, well knowing that the same had been theretofore feloniously stolen from a railroad car moving in foreign commerce.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, William Ratcliff did then and there knowingly, wilfully, unlawfully and feloniously on the 14th day of September, 1919, possess and conceal a certain sack of sugar, to wit, 50 pounds of sugar, theretofore feloniously stolen from an interstate shipment of sugar travelling in interstate from San Francisco, California, consigned to Powell-Sanders Co., Spokane, Washington, in Northern Pacific car 23,247, which said sugar said defendant William Ratcliff hauled in Northern Pacific R. R. train on September 14, 1919.

That after the formation of said conspiracy and in pursuance thereof and in order to effect the object thereof, Lemuel S. Fowler, William Ratcliff and James Francis Mellison, on the 28th day of March, 1920, at Renton, in King County, in the Northern Division of the Western District of Wash-

ington, did then and there knowingly, willfully, unlawfully and feloniously offer to sell and dispose and negotiate for the sale and disposition of certain stolen property, to wit, certain automobile tires, lately stolen from Northern Pacific freight-car 101,-059 while moving over the Northern Pacific Railroad, from the city of Seattle, Washington, to the city of Portland, State of Oregon.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said Ethyl Hanson and Herbert William Hanson, and each of them, on the 28th day of March, 1920, at Auburn, in the Northern Division of the Western District of Washington, did then and there unlawfully, knowingly, wilfully and feloniously possess and conceal certain articles, goods, wares and merchandise theretofore feloniously stolen from a railroad car moving in interstate commerce and being and constituting a part of an interstate shipment of freight, to wit, certain automobile tires, a more particular description whereof is to the grand jurors unknown.

That after the formation of said conspiracy and in pursuance thereof and in order to effect the object of the same while said conspiracy remained in effect, at the city of Auburn, in King County, in the

Northern Division of the Western District of Washington, and on March 28, 1920, the said Ethyl Hanson, Herbert William Hanson, William Ratcliff, Lemuel S. Fowler and James Francis Mellison, and each of them, did knowingly, wilfully, unlawfully and feloniously assemble together and in automobiles proceed in a westerly direction to a point beyond what is known and called "Cemerery Hill," where they, and each and all of them, uncovered, discovered and removed a cache of goods, wares, and merchandise, to wit, automboile tires, theretofore stolen, removed, secreted, and hidden from the railway freight-cars in which they were moving in interstate commerce, and placed said tires in said automobiles and transplanted them in said automobiles to a point east of Covington, Washington, where said defendants, and each of them further uncovered, found and discovered certain goods, wares and merchandise, to wit, shoes previously stolen while being transported in interstate commerce, and then and there the said last above-named defendants, and each of them, proceeded to transport in said automobiles the afore-said stolen goods and property to the city of Auburn, Washington.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the ob-

ject of the same, while said conspiracy was still in existence and effect, and on the 28th day of March, 1920, in King County, in the Northern Division of the Western District of Washington, the said Lemuel S. Fowler, William Ratcliff and James Francis Mellison, and each of them, did wilfully, knowingly, unlawfully and feloniously assemble together in the city of Renton, King County, at Edwards' garage.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of the same, while said conspiracy remained in effect, and on the 28th day of March, 1920, at Renton, in the Northern Division of the Western District of Washington, the said Lemuel S. Fowler, William Ratcliff and James Francis Mellison, and each of them, did knowingly, wilfully, unlawfully and feloniously negotiate for the sale of various and sundry articles, to wit, said automobile tires and shoes to one E. Hughes.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, while the same was still in existence and effect, at Renton, in the Northern Division of the Western District of Washington, on March 28, 1920, the said Lemuel S. Fowler, William Ratcliff and

James Francis Mellison, and each of them, did knowingly, wilfully, unlawfully and feloniously, agree to sell said goods, wares and merchandise theretofore feloniously stolen from interstate shipments, to wit, said automobile tires and said shoes, a more particular description of which is to the grand jurors unknown, to one E. Hughes, for the sum and price of fifteen dollars (15) for each of said automobile tires and three dollars (3) per pair for each and all of said pair of shoes.

That after the formation of said conspiracy and in pursuance thereof and in order to effect the object thereof, and while said conspiracy was still in effect, at Edwards' Garage, in the City of Renton, King County, in the Northern Division of the Western District of Washington, on March 28, 1920, the said Lemuel S. Fowler did knowingly, wilfully, unlawfully, and feloniously attempt to pull an automatic 38-calibre revolver and shoot Deputy Sheriff S. Campbell.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof,, while said conspiracy was still in effect, the said William Ratcliff, James Francis Mellison and Lemuel S. Fowler, and each of them, knowingly, wilfully, unlawfully and feloniously, unloaded

and discharged from said automobiles in which they transported said automobile tires and cases of shoes, on the 28th day of March, 1920, at Edwards' Garage, in the city of Renton, King County, in the Northern Division of the Western District of Washington.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof. while said conspiracy was still in effect, the said William Ratcliff, James Francis Mellison, and Samuel Fowler, and each of them, knowingly, wilfully, unlawfully and feloniously, on the 28th day of March, 1920, assembled together in Edwards' Garage, in the city of Renton, in the Northern Division of the Western District of Washington, and then and there were armed with deadly weapons, each of them carrying a pistol.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of the same, while said conspiracy was still in effect, the said Lemuel S. Fowler at Auburn, in the Northern Division of the Western District of Washington, on March 25, 1920, knowingly, wilfully, unlawfully and feloniously, stated to one John Doe as follows: "Why do you want to know where Con-

ductor Scott lives?" to which John Doe replied, "I heard he had some auto tires to sell." Whereupon Fowler replied, "I am the fellow."

That after the formation of the said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, Herbert W. Hanson did then and there wilfully, unlawfully and feloniously, on March 23, 1920 offer, to sell and deliver to one John Doe Welch certain articles, goods, wares and merchandise, theretofore feloniously stolen from a railroad car moving in interstate commerce and being and constituting an interstate shipment of freight, to wit, certain automobile tires and cigarettes, and other goods and chattels, a more particular description thereof being to the grand jurors unknown.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said Lemuel S. Fowler, on the 23rd day of March, 1920, at the city of Auburn and vicinity, in the Northern Division of the Western District of Washington, did then and there wilfully, unlawfully and feloniously offer to sell and deliver certain articles, goods, wares and merchandise, theretofore feloniously stolen from a railroad car moving in interstate commerce and being and con-

stituting a part of interstate shipment, to wit, certain automobile tires for the price of ten dollars (\$10) each, and certain cigarettes for the price of thirty-five dollars (\$35) per carton containing one thousand cigarettes in each carton, and other goods and chattels, a more particular description is to the grand jurors unknown.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said James Francis Mellison, on the 23rd day of March, 1920, at the city of Auburn and vicinity, in the Northern Division of the Western District of Washington, did then and there wilfully, unlawfully, knowingly and feloniously offer to sell and deliver certain articles, goods, wares and merchandise theretofore feloniously stolen from a railroad car moving in interstate commerce and being and constituting a part of interstate shipment, to wit, pig tin to a certain John Doe Welch.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said James Francis Mellison, on the 29th day of March, 1920, at the city of Seattle, in the Northern Division of the Western District of Washington, did then and there wilfully, unlawfully and feloniously offer to sell and deliver to

Stewart Campbell in consideration of the said Stewart Campbell then and there releasing the said James Francis Mellison from arrest, certain articles, goods, wares and merchandise, theretofore feloniously stolen from a railroad car moving in interstate commerce and being and constituting a part of interstate shipment, to wit, pig tin, a more particular description of which is to the grand jurors unknown.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of the same, the said Joe Veagus, on the 24th day of January, 1920, walked to and approached the caboose attached to the freight train just brought in under the supervision of Conductor Thomas E. Jones, and said to Thomas E. Jones, "Did you bring any more of that stuff down this morning?" To which Thomas E. Jones replied, "No; look out, the bulls are coming,"—contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT II.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on, to wit, the 30th day of March, 1918, and

continuously thereafter to the time of the presentment of this indictment,, at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court Lemuel S. Fowler, George E. White, Clarence H. Bellamy, Albert Bruce Paris, Thomas E. Jones, Edward Bourdell, Sarah Jones, Joe Veagus, Herbert William Hanson, Ethyl Hanson, William Ratcliff, James Francis Mellison, Thomas Singer, David Jones and Creed Lane, George H. Trepanier and Mrs. J. A. Lewis, have unlawfully, corruptly and feloniously combined, conspired, confederated and agreed together, and one with the other, and together and with divers other persons to the grand jurors unknown, all of the said defendants hereinabove named and said other persons unknown being hereinafter called the conspirators, to commit an offence against the United States, to wit, to violate section 35 of the Penal Code of the United States, as amended by the Act of Congress approved October 23, 1918, it being there and then the plan, purpose and object of the *then and there the plan, purpose and object* of the conspiracy and of the said conspirators that they, the said conspirators, and each of them ,should and would knowingly, wilfully, unlawfully and feloniously take, steal and carry away for their own use of the said conspirators, and each of them, and

for the own use of the said conspirators, and each of them, and for the use of other persons to the grand jurors unknown, with the unlawful and felonious intent then and there on the part of said conspirators, and each of them, to steal and purloin certain personal property of the value of the United States; it being then and there the further plan, purpose and object of the said conspiracy and of the said conspirators, and each of them, that they, the said conspirators and each of them, would and should take, steal and carry away the said goods, wares, merchandise and chattels as aforesaid, and with felonious intent as aforesaid, from certain railroad cars, railroad station-houses, railroad platforms, railroad depots and railroad yards and premises then and there in and under federal possession and control.

That after the formation of said conspiracy, and in pursuance thereof and in order to effect the object thereof, the said several defendants, at and on the several places and dates in Count I of this indictment more particularly mentioned and set forth, did then and there knowingly, wilfully, unlawfully and feloniously do and commit each and all of those certain acts referred to and set forth and charged as having been committed by said

defendants in Count I of this indictment at and on line 9, page 4 to and including line 4, page 17, of this indictment, to which reference is hereby made, the same incorporated in this count as if more fully set forth herein; contrary to the form of statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT III.

And the grand jurors aforesaid, upon their oaths, aforesaid and continuously thereafter to the time of the present:

That on, to wit, the 30th day of March, 1918 presentment of this indictment, at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, Lemuel S. Fowler, George E. White, Clarence H. Bellamy, Albert Bruce Paris, Thomas E. Jones, Edward Bourdell, Sarah Jones, Joe Veagus, Herbert William Hanson, Ethyl Hanson, William Ratcliff, James Francis Mellison, Thomas Singer, David Jones and Creed Lane, George H. Trepanier and Mrs. J. A. Lewis, have knowingly, wilfully, unlawfully corruptly and feloniously combined, conspired, confederated and agreed together, and one with the other, and together and with divers other persons to the

grand jurors unknown, all of the said defendants herein above named, and said other persons unknown being hereinafter called the conspirators, to defraud the United States in the manner and by the means of following, to wit, that they the said conspirators, and each of them should and would knowingly, wilfully, unlawfully and feloniously take, steal, carry away, purloin, embezzle and convert to their own use certain goods, wares, merchandise, chattels and property then and there moving as and constituting a part of certain shipments of freight and express on and over certain railroad routes and systems of transportation *then there* under federal control, the said goods, wares, merchandise, chattels and property then and there being in the possession of the United States as a common carrier of goods for hire; and also certain tolls, equipment and property then and there used in the maintenance and operation of certain railroad routes and transportation systems then and there under federal control.

That after the formation of said conspiracy and in pursuance thereof and in order to effect the object thereof of the said several defendants, at and on the several places and dates in Count I of this indictment more particularly mentioned and set forth, did then and there knowingly, wilfully, un-

lawfully and feloniously do and commit each and all of those certain acts referred to and set forth and charged as having been committed by said defendants in Count I of this indictment, at and on line 9, page 4, to and including line 4, page 17, of this indictment, to which reference is hereby made, and same incorporated in this count as if more fully set forth herein; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

ROBERT C. SAUNDERS.

United States Attorney.

To this indictment and each count of it the defendants demurred which demurrers were overruled. An exception was allowed.

After the jury was empaneled, the defendant, Wm. Ratcliff withdrew his plea of not guilty and entered a plea of guilty to each of the three counts in the indictment, and immediately thereafter took the witness stand and became the first witness for the Government. The material part of his testimony, together with his cross-examination follows:

Record page 86 and following pages:

The COURT.—Let the records be changed and

the plea of guilty entered to each of the three counts. Move for sentence.

Mr. SAUNDERS.—The Government does not move for sentence, your Honor, but asks that it be postponed.

Direct Examination.

My name is *William Radcliff*. I am thirty-nine years of age, and by occupation a *railroad conductor*; I have been a railroad conductor for twelve years, working for the *Northern Pacific Railway Company*. I ran on the division from Auburn to Ellensburg and Ellensburg to Auburn. I was a freight conductor running on freight trains. The trains are classified as an "Extra" from *Auburn to Ellensburg* and from *Ellensburg back to Auburn*. *Auburn is the terminus of the Seattle division of Northern Pacific Railroad, and the freight-yards and roundhouse is there*. They handle in the freight-yards an average of five hundred cars a day; are in the yards nine day crews and seven night crews, numbering from a hundred men including engineers and switchmen. The crews make up the trains as they come in, break them up and make them up for the various points they are billed to. From the Auburn yards to Covington is eight miles.

On the other side of Covington is Mile Post 91; that is, counting from Ellensburg West.

From *March* 1918, up to the finding of the indictment, the *train crew consisted of three brakemen besides myself, the conductor*. The head brakeman rides the engine; the other two ride the caboose. The caboose is carried on the rear end of the train, and has a cupola for a lookout over the train on both sides. Inside the caboose is the clothes locker, toilet and lockers for coal and tools, there is just one clothes locker, and this is accessible to the four men of the crew.

On March 20, 1920, I made a trip from Ellensburg to Auburn, leaving Ellensburg at 9:00 A. M. and arrived at Auburn at 4:30 P. M. the same day. *C. H. Goldman, Dave Jones and H. W. Hanson* were my brakemen on the trip.

I heard a conversation between the defendants Dave Jones and H. W. Hanson in my caboose on that trip about getting shoes. They said that they were going to get four cases of shoes and that they had a sale for them. The four cases of shoes were in the Northern Pacific freight-car; in the P. F. E. refrigerator-car. The train consisted of forty-five cars carrying merchandise.

On the east side of the divide before we got to

Easton, I heard the defendants, Jones and Hanson in conversation. After the conversation they carried the four cases of shoes off of the train and put them in the salal brush, about Mile Post 91,—about three miles east of Covington. The train stopped at this point because of a hot-box on a car of coal; it stopped about 30 minutes. I saw the defendants Jones and Hanson take these shoes in their boxes from the car and cache them in the salal brush. It was about 2:30 P. M. The train then proceeded to Auburn and arrives there at 4:30 P. M.

Mr. Hanson said he had a sale for the shoes and the money would be equally divided between the three of us. He gave samples of the shoes to a man named Ayers to be sold in Renton and got a price for them.

Witness identifies cases of shoes as those having been taken out of the car and cached in the salal brush, by defendants Jones and Hanson.

Between the time the shoes were taken out of the car and hidden, and now, I have seen two cases of them.

On the evening of March 27th last, I had a talk with Hanson about these shoes; and also with Mrs. Hanson and a man named Ayers. Hanson and his

wife live about a mile from my house at Auburn. William Hanson came to my house that day in an automobile; my wife was there at that time. Hanson proposed that we go up and get the shoes in the salal brush near Mile Post 91. We held a conversation with Ayers. Ayers was in his car, and Hanson's car was standing close to Ayers' car at the corner of Main and Enumclaw Road. Hanson said that a sale had been made; he said that samples had been furnished Ayers, and that Ayers had made a deal with Rogers at Renton, a dollar and a half for the canvas shoes and three dollars for the other shoes. Ayers was to get a commission of 60c a pair for selling the shoes, on delivery.

I got into Hanson's car, with Mrs. Hanson and Herbert William Hanson. Hanson's car went first and was followed by Ayers' car containing Ayers alone. They walked up into the salal brush, and after about thirty minutes got two cases of shoes that I have identified here, carried them down the road and loaded them into Ayers' car. We then went to Auburn. On arriving at Auburn, Hanson said he was tired, and asked me to go to Renton and collect the money. We went up to the foot of the Pacific Highway where it meets the road leading to cemetery hill. Ayers signalled with a spotlight and

waited twenty minutes. We then drove back to Auburn.

Ayers and I went to the St. Elmo Hotel, owned by Mrs. J. A. Lewis, one of the defendants here. It was about 12:30 A. M. on the morning of the 28th. I rang the office bell and she came down to the door. I asked for Fowler; I told her that Ayers had an agreement to meet him that night with some tires she said he was up on the hill getting some tires. Then I told her I had a shoe deal. She said "Who is the man?" I says: "I don't know." I told her they were sold in Renton, and the man was recommended to me by Hanson as having done quite a bit of business with him before and he was all right. She said nothing else.

Ayers and I got into the machine and went out to the foot of cemetery hill, worked a signal a few times at the side of the hill, and Fowler's car was seen coming down with yellow headlights on. Fowler's car came within fifty feet of the rear of the machine we were in, and contained Fowler and a man unknown to me, and twelve automobile tires. I later saw the tires when they were unloaded at Renton. I did not hear Fowler say anything when he drove up. I looked out of the car and I could see Fowler and Ayers talking a couple of minutes; I did

not hear them. Ayers then drove his car to Renton, followed by Fowler. I rode in Ayer's car. We got to Renton and went into the alley to the garage; it was Rogers' garage; we waited while Ayers went and notified Rogers that the goods had arrived; in a little while Rogers came down and opened up the sliding-doors of the garage; Ayers drove in and unloaded the shoes, two cases of which I have identified; as Ayers backed out of the garage, Fowler drove in; as Ayers backed out, the deputies came in.

Rogers says: "Count the shoes while I help him get those tires out." Then the sheriffs came in and arrested the three of us, myself Fowler and Mellison; Mellison was the man who had come down the hill in Fowler's machine. Ayers worked an automatic on the sheriffs and backed the car out of the garage. He has been seen in Auburn several times since. The automatic revolver was taken off Fowler. Mellison, Fowler and I were taken to jail. The Chinese matting offered in evidence as Government Exhibits 5 and 6, were taken off my train on March 2d, 1920. The matting came out of a Pennsylvania car. The members of my crew were C. H. Goldman, Dave Jones and W. H. Hanson. Goldman was head brakeman; Dave Jones and Hanson were also brakemen. Jones and Hanson took the two rolls of mat-

ting out of the car at Easton. Before they took them, Hanson told me he was going to get some matting. The matting was left on the right of way at Easton until we came back. The matting was thrown out of the car at 11:15 P. M. We got back to that place at 6:00 P. M. on the 3rd. Jones and Hanson picked up the matting and threw it into an empty car, and it was hauled to Covington and put off in the brush by Hanson and Jones.

Hanson afterwards went up in the automobile and got the matting, and left two rolls at my house. He left it on the morning of the 4th.

I identify Government's Exhibit 7 as a Wheel Report, showing that the matting was being hauled out from Auburn towards Ellensburg, on the Pennsylvania Railroad 43,493. Car was marked "bad order." It had a defective door. The top was open at least eighteen to 20 inches, and was not connected at the top.

I know the defendant Trepanier; he was a brakeman and ran as part of my crew a few trips. He lived in Auburn. Late in October, 1918, Trepanier brought an electric drill to my house. I had some work to do but could not use the drill. Trepanier told me he had one,—said he had gotten it out of a railroad car a couple of months prior to that time.

The drill was an electric, Tempco single motor drill. I had it about seven days and Mr. Trepanier came and took it away. I could not identify the drill; there are hundreds like it and I did not get the number of it. I failed as a conductor to protect the property of the railroad company.

Mrs. Lewis is the proprietor of the St. Elmo hotel, at Auburn, Washington. Fowler rooms in her hotel; how long he has roomed there I dont know.

Cross-examination

(Question by Mr. DORE.)

Q. Mr. Ratcliff, you were the conductor on these two trains? The train that the shoes came off of, and the train that the matting came from?

A. Yes, sir.

Q. And the agreement—the conspiracy to rob the railroad, to which you have pleaded guilty, consisted of an agreement to steal from the car upon which the shoes were, and the cars upon which the matting was—that was the criminal conspiracy that you were a part of it? A. Yes.

Q. With which of these defendants did you ever enter an agreement to commit a crime against the railroad? A. Hanson and Jones.

Q. Hanson and Jones. Those are the only two?

A. Yes, sir.

Q. Those are the only two people of all these defendants that you had any agreement to violate any of the laws of the railroads belonging to the United States?

A. Yes, sir.

Q. And these three conspiracies to which you have entered a plea of guilty included both of your co-conspirators, Hanson and Jones, and no other persons in this court?

A. Yes, Sir.

Q. You never in other words, had any agreement to commit any crimes with George H. White?

A. No sir.

Q. And you didn't plead guilty to any crime to which he was a party? A. No, sir.

Q. And you never had any agreement to commit any crime with Clarence H. Bellamy.

A. No, sir.

Q. And you had no agreement to commit a crime with Albert Bruce Paris? A. No.

Q. And you had no agreement to commit any crime or crimes with Thomas E. Jones? A. No.

Q. Or with Edward Bourdell?

A. No.

Q. Or with Sarah Jones? A. No.

Q. Or Joe Vargus? No.

Q. But You did with Herbert William Hanson?

A. Yes, sir.

Q. And you did with Ethel Hanson, so far as you have related? The only connection, I understand, that she had with that affair, is that she was a passenger in this car the day you went to get the tires?

A. Yes.

That is all the connection she had, she just rode along to get the tires? A. Yes.

Q. That is all the connection she had? She just rode along when you went out in the car to get the tires and to get the shoes? A. Yes, sir.

Q. That is all Ethel Hanson had to do with it. She was the wife of Herbert William Hanson. William Ratcliff is yourself. With James Francis Mellison you never had any agreement of any kind?

A. No, sir.

Q. All you know about Mellison is, when Fowler came down the road in an automobile that had some tires, Mellison was with him, isn't that true?

A. A man unknown to me.

Q. Afterwards you learned him to be Mellison?

A. Yes, sir.

Q. After he was arrested. You never knew Mellison before he was arrested? A. No, sir.

Q. Consequently you never had any dealings or agreement or conversations relating to theft with Mellison? A. No.

Q. And Thomas Singer. I take it you never heard of Thomas Singer in your life until you met him here

in this court. You never had any dealing with Thomas Singer? A. No, sir.

Q. He was a party to no crime of conspiracy which you were ever in. And David Jones, he was in this one that you are in? A. Yes, sir.

Q. Creed Lane, you never had anything to do with him? A. No, sir.

Q. And Trepanier, all that you had to do with him was that you told him you needed an electric drill to do some work with, and he brought an electric drill down to your house; isn't that true? A. Yes, sir.

Q. You and he never stole the drill together?

A. No, sir.

Q. You had no agreement to steal it? A. No.

Q. You had personally nothing to do with the drill excepting using it?

A. I did not use it; I could not use it.

Q. Trepanier knew; he was on the train that you were running a couple of times? A. Yes, sir.

Q. Those times nothing was stolen; is that right?

A. Yes, sir.

Q. Nothing was stolen then? A. No.

Q. As I understand, Mrs. J. A. Lewis,—stand up, Mrs. Lewis,—that is Mrs. Lewis? A. Yes, sir.

Q. She is the owner om the St. Elmo Hotel in Auburn? A. Yes, sir.

Q. That is the largest hotel in Auburn, is it?

A. Yes.

Q. It is a hotel of fifty or sixty rooms. Auburn is a railroad town? A. Yes, sir.

Q. The population, or the chief occupation of the majority of the population is railroading, isn't it?

A. Yes, sir.

Q. The railroad group makes up the great part of the population. The occupants of practically all the hotels, including the St. Elmo Hotel, are railroad employees, aren't they? A. Yes, sir.

Q. And Fowler lives at the St. Elmo Hotel; isn't that true? A. That I don't know.

Q. You never had any agreement with Mrs. Lewis to rob any box-cars, and steal anything, in interstate commerce? A. No, sir.

Q. You never had any transaction with her in regard to stolen property or anything like that?

A. No. Sir.

Q. As I understand, all you know about Mrs. Lewis—the only dealings she had with you, you went to her hotel one night and asked where Fowler was?

A. Yes.

Q. And she told you that Fowler had gone up on a hill to get some tires? A. Yes, sir.

Q. And you told her that you were selling some shoes, did you? A. Yes, sir.

Q. She asked you to whom you were selling the shoes? A. Yes.

Q. And you told her to a man named Ayers; is that it?

A. A man named Ayers was the salesman and the purchaser was Rogers in Renton.

Q. She had nothing to do with either Ayers or Rogers so far as you know?

A. Absolutely nothing.

Q. And absolutely all she had to do with you was, she came to the door of the hotel when you inquired for Fowler, and said she thought Fowler was up on the hill getting some tires; is that right? A. Yes.

Q. Now, this fellow Fowler, he runs a stage or jitney, up here in Auburn; that is his occupation?

A. I don't know.

Q. You don't know that he does that? A. No.

Q. All you know about Fowler that night is that he came along the road with an automobile in which the tires were? A. Yes, sir.

Q. You had nothing to do with those tires?

A. No, sir.

Q. You were not connected with those tires any more than I am connected with them?

A. No, sir.

Q. You never stole them, never conspired to steal them; never agreed to steal them with anyone, nobody agreed to steal them with you, or to have anything to do with those tires so far as you are concerned? Is that right? A. That is right.

Q. The conspiracy that you are in included only you, and David Jones and Mr. Hanson; is that right? A. Yes, sir.

No terms were made to me for pleading guilty. I wanted the drill because I was doing some work on a patent car lock,—so that the seal could be abolished and a lock used. Hanson, Jones and myself are equally guilty of stealing shoes and matting. I was the conductor. Jones was the middleman and Hanson was the rear man. The head brakeman stays on the engine and handles the head end of the train; to head the train in and out of sidings. He doesn't attend to hot-boxes or broken bars unless it is close to the end of a long train. The head brakeman takes his orders from the engineer when he is on the train, and all the brakemen are responsible to the conductor.

Roy Ayers—A Detective

The Roy Ayers referred to in Ratcliff's testimony was a detective in the employ of the Northern Pacific Railroad for the purpose of causing the arrest of persons stealing from box cars. He posed as a middleman-man for the sale of stolen goods. and in this way gained the confidence of those whose arrest he was intending to bring about. (Record p. 99).

Ayers testified that he went to Auburn in November, 1919, and opened up a garage. The garage, however, was for the purpose of throwing off

suspicion from his real occupation, that of a railroad detective. He testified he knew Lemuel S. Fowler, the plaintiff in error, Herbert William Hanson, Mrs. Hanson and Wm. Ratcliff, James Francis Mel-lison, David Jones, Creed Lane and Mrs. J. A. Lewis.

He did not, however, know Clarence H. Bellamy, George E. White, Albert Bruce Paris, Thomas E. Jones, Edward Bourdell, Sarah Jones, Joe Veagus, Thomas Singer or George Trepanier. He followed Ratcliff to the witness stand.

The following enquiry was made of him: (Record p. 99)—

Q. "Now while you were in the garage business at Auburn did you have negotiations and dealings with these defendants, or any of them, concerning stolen property?"

A. Yes, sir.

Q. Now, begin at the beginning; who was the first defendant, what was it about, and about when?"

Assignments of Error—One to Five

At this point the following objection was made to the introduction of testimony relating to any conspiracy other than the conspiracy related by the witness Ratcliff.

The Ratcliff conspiracy being confined to himself.

Herbert William Hanson, Ethmyl Hanson and David Jones.

The objection as it appears from the Record, page 100 was as follows:

Mr. Dore: "Now, your Honor, I object on the ground that it is incompetent, irrelevant and immaterial for this reason: Mr. Ratcliff has pleaded guilty to three conspiracies. He said that there was no one in these conspiracies except Jones and Hanson.. The Government must try one single criminal agreement here, or at least the three criminal agreements which they have elected by Ratcliff's testimony to bind themselves before the doings of the other defendants becomes admissable with this great mass of stuff that is here. The Government must first connect these defendants with Ratcliff and with this conspiracy that, according to their own testimony at this time there was no one in except Mrs. Hanson, Mr. Hanson and Dave Jones. You can't try a score of conspiracies, or a score of groups, or a score of different crimes here.

It is true the agreement may be single, and the object may be multiform, that is true, but still before testimony as to what other defendants did or said to this man, or what dealings he had with them,

they must be brought within the scope of this conspiracy. Now, to narrow this case, we demand at this time, or at least to save time, the Government state to the Court what conspiracy they are trying here, and who they intend to prove the conspirators are, and they be permitted to introduce no testimony against any defendant except such as they may state to the Court their proof will show to be members of the conspiracy that Ratcliff has already testified to."

The Court: "I cannot rule of what the evidence shows in advance of hearing the evidence. Objection overruled."

Plaintiffs in error admit that at this point in the trial the Court's ruling was undoubtedly correct. There was no way for the Court to tell what the condition of the Government's case would be at the end. However, as plaintiffs in error will hereinafter point out, the situation from a legal standpoint was just the same at this point in the case as it was at the close of the Government's case, when the plaintiffs in error, together with the other defendants made a motion to compel the Government to elect between the conspiracies that Ratcliff had testified to and the other separate and distinct conspiracies that had been proven in the case and the plaintiffs in error

took an exception to the Court's refusal to compel this election. (Record, p. 145).

Ratcliff's testimony ,as has been pointed out, was to the effect that he, together with David Jones, Herbert William Hanson and Ethyl Hanson, were involved in a consummated theft of several cases of shoes, and also of some Chinese matting from the Northern Pacific Railroad. He, together with David Jones and Herbert William Hanson composed the crew of the train from which these articles were stolen. Ratcliff maintained in his cross-examination, and at all times, that no persons, other than those he had specified, had any connections with these thefts, and positively denied that he had never been involved in any other thefts or in any other crimes, or any other conspiracy to steal.

Ayers Catches Two at Once

Ayer's testimony was to the effect that he had learned that Hanson had the shoes and that Hanson and Ratcliff had stolen the shoes. He posing as an ostensible buyer of stolen goods, made an arrangement with Ratcliff and Hanson for the delivery of the shoes by automobile to a garage in Renton. Ayers had by arrangement with his superior officers

caused the arresting officers to be concealed in the garage.

After Ayers, the railroad detective, had made arrangements with Hanson and Ratcliff, he learned through an independent source, from Conductor Scott, that the plaintiff in error Fowler was in the possession of some automobile tires. These tires that were found in the possession of the plaintiff in error, Fowler, were shipped from Seattle, Washington, to Portland, Oregon, and were stolen in transit between Seattle and Auburn. None of the defendants ran on trains that operated between Seattle and Auburn. Some were conductors and brakemen on trains running from Auburn to Ellensburg, but none, at any of the times in question had ever worked between Seattle and Auburn.

There is an entire absence of testimony as to how and when the tires were stolen. All that is known of the tires is that they were shipped from Seattle to Portland and never reached Portland; that Fowler offered them for sale to Ayers; that Ayers offered to buy them from Fowler, who was operator of automobiles for hire, and who made arrangements with Ayers to meet him on a public highway with the automobile tires, and that Ayers was to flash a light when he was ready for Fowler to keep his appoint-

ment. Mellison was a passenger in Fowler's automobile on the night of the delivery of the automobile tires to the garage in Renton. Mellison, however, was found not guilty on all three counts by the jury.

There is absolutely no evidence showing any connection between Fowler and the group composed of Ratcliff, David Jones, Ethyl Hanson and Herbert William Hanson. In fact, Ratcliff in his testimony denied that he ever had any connection whatsoever with Fowler. It simply happened that the detective for the Northern Pacific Railroad decided to set a trap for Ratcliff, Hanson and Jones simultaneously with the trap that he set for Fowler and Mellison.

Fowler, according to the testimony, was never involved in any of the transactions except that of the automobile tires that he was delivering at the garage in Renton. Fowler may have, according to the testimony, been guilty of stealing these tires from the Northern Pacific Railroad; or he may have been guilty of having them in his possession, knowing them to have been stolen.. For this offence he was indicted under another indictment and now awaits trial. But there was no evidence connecting him with the conspiracy in which Ratcliff, David Jones, Herbert William Hanson and Ethyl Hanson had a part.

The tires stand out alone by themselves. There is no testimony except Fowlers as to how they came into his possession. His testimony amounted to an entire denial of all guilt. Of course, the verdict of the jury means that the jury refused to credit his testimony, and probably for the same reason this Appellate Court may justly refuse to credit it.

That Fowler had nothing to do with the conspiracy to steal and the consummated stealing connected with Radcliff, is borne out by the testimony of Ayers, at page 104 of the Record. After relating his apprehension of the Ratcliff party he testified as follows:

"I learned that Fowler had tires to sell through a conversation I had with Scott, a railway conductor. After Scott told me that Fowler had some tires to sell, Fowler came to me and told me that he had thirteen tires. I told him that I had a buyer at Renton who would buy them. I told Payne (chief railroad detective) about Fowler and the tires on March 27th. Fowler was just an addition to the party."

Q. "You picked him up accidentally?"

A. Just accidentally."

Clifford W. Scott, the person from whom Ayers testified he got his information regarding the tires that were found in Fowler's possession, corroborated

(at page 111 of the Record) Ayers upon this proposition.

“I have known Fowler about a year. On March 17th I met him. About March 17 of this year I met him on the main street in Auburn. I asked him if he had some tires he wanted to get rid of and he said he did; he wanted to know if I had a place to get rid of them; I told him I did; he wanted to know how much he could get for them and I told him I didn't know. He went and got a price list and we talked about the price list; we separated and afterwards met Mr. Ayers, and I had no further conversation with him that I know of.”

The further testimony in the case can be briefly outlined as follows:

Upon a search warrant the hotel of Mrs. J. A. Lewis at Auburn was searched. In the house was found six knives of a similar pattern, but not identified as the identical knives, stolen from an interstate shipment. Mrs. Lewis was acquitted.

Edward Bourdell and George E. White were roommates and fellow railway employees. In the room of Bourdell was found stolen clothing that had been taken from interstate shipments. Bourdell committed suicide during the trial before he had been furnished any opportunity to take the witness stand in

his own defense. The verdict, however, finds him guilty. George E. White, his room-mate, was found not guilty.

In the home of Creed Lane, a railway brakeman, was found a mass of merchandise of all kinds and descriptions, that had been stolen from interstate shipments. The merchandise found in Lane's home had been stolen from trains upon which Bourdell, Bellamy and Thomas E. Jones were the members of the crew.

In a caboose of a Northern Pacific train, of which Thomas E. Jones was the conductor, Edward Bourdell and Creed Lane the brakeman, some stolen property of small value was found. In Bellamy's home was found an overcoat that was identified as part of an interstate shipment stolen from a car upon which Bellamy, together with Creed Lane, Thomas E. Jones and Edward Bourdell were members of the crew. Testimony was introduced showing that all this merchandise was interstate commerce.

Mrs. Sarah Jones ran a hotel in Auburn. In her hotel was found some merchandise identified as stolen. Joe Veagus' connection with the case is an alleged conversation with Thomas E. Jones; Ethyl Hanson's connection with the case is that she rode

with her husband in an automobile containing some stolen property; George H. Trepanier's is that he loaned a drill to Ratcliff. Sarah Jones, Veagus, Thomas L. Jones, Ethyl Hanson and George H. Trepanier were acquitted.

Thomas Singer, the second plaintiff in error, ran a hair dressing establishment in Seattle, under the name of Thomas Singer, Inc. It is admitted by the Government and there is no testimony to the contrary, that the only defendant that Singer ever met was Bourdell. The Government's testimony relating to Singer is covered by the examination of the testimony of J. M. Clark, a witness for the Government. (Record p. 126)

Bourdell had been a customer of Thomas Singer's company for some years. He had gone to France and while in France had had Singer forward him some hair-dressing goods. Clark testified that some time in February Bourdell came into the store. Bourdell was wearing a toupee that he had purchased in the store. Bourdell had some shoes; Singer insisted that his partner Clark try on some of the shoes. The shoes did not fit Clark. Singer asked Bourdell if he thought he could get some others to fit Clark, Bourdell said he wasn't sure.

After Bourdell was gone, during the same day Clark asked his partner Singer when Bourdell was going to pay for the toupee he was wearing, the price of the toupee being \$35. "Singer said that Bourdell had already paid for it" and Clark said "how do you figure that? I have no record of it having being paid for and Singer said 'Well, I got an overcoat from him'. Clark said, "That is a funny way of straightening up the firm's account," and he said, "you had a chance to have a pair of shoes and you turned it down; that is your fault. Clark said, "Who is this fellow Bourdell, anyway, who is he and what is he," and Singer told me he was a freight clerk in the railroad. I says, "How does he come to be peddling this stuff?" He says, "Well, he is no worse than the rest of them; all these railroad men, they get all kinds of stuff that they want; they can get it". (Record, p. 127).

About two weeks later Bourdell came into Singer's place and left a bundle in which was some clothing. The Government didn't offer any explanation of why it was left there. Singer's testimony on this point was that it was left for safe keeping. However, the contents of the parcel was never identified as property of the railroad.

Clark's testimony about the overcoat was borne

out by the finding of an overcoat belonging to Hart-Schaffner and Marx that had been shipped from Philadelphia to Seattle and stolen in transit. Singer was wearing this overcoat. When an explanation was demanded as to how he came into possession of the coat, he stated he had bought it off of Hart Schaffner & Marx store in Seattle. It was proven conclusively that no coat of the style or pattern had ever been in possession of Hart Schaffner & Marx store in Seattle, and that it was the identical coat stolen enroute from Philadelphia to Seattle.

The train from which the coat was stolen was one upon which Edward Bourdell, Creed Lane and Tom Jones were members of the crew.

It was conceded by the Government, and no evidence was ever offered to dispute the fact, that Singer had no acquaintance with anyone except Bourdell. It was admitted by the Government that Singer did not know Fowler; did not know Creed Lane; did not know Herbert William Hanson or William Ratcliff. It is also admitted by the Government that Singer's sole connection with the affair, outside of his acquaintance with Bourdell, was the acceptance of the stolen overcoat for a toupee.

It is true that the Government proved by the testi-

mony of J. B. Armstrong, who owned the Buster Brown Shoe Store in Seattle, that Singer had negotiated with him (Armstrong) for the rental of a part of the shoe store, to be used by Singer in his hair dressing business and that in a conversation one day Singer inquired of Armstrong if he ever bought shoes from others than the manufacturers. Armstrong stated that he did and Singer stated that he had a friend who sold Shoes. Some days afterwards he brought Bourdell to Armstrong's store and introduced him as the man to whom he had referred, who had shoes for sale. Singer went away. Bourdell showed Armstrong some shoes, which Armstrong did not desire to purchase. This was the end of the transaction.

Singer had never heard of Fowler until they were jointly indicted and had never seen him until he had seen him in court. This was the condition of the record at the time the motion to compel the Government at the close of its case to elect against which group of conspirators it desired to proceed.

The evidence did show that Ratcliff, David Jones, Herbert William Hanson and Ethyl Hanson, composed one separate and distinct group, that there was an agreement among them to steal and dispose of property belonging to the Nor-

thern Pacific Railroad and that these thefts had been consummated. A verdict of guilty returned against these four by the jury would undoubtedly have to be sustained, as there would be some evidence in support of it, of course, the weight and the amount of evidence being a question for the jury. However, the jury found David Jones and Ethyl Hanson not guilty.

Fowler was connected with nothing but the tires. When they were stolen, where they were stolen or by whom they were stolen, there is no evidence in the case to show. It is true that Fowler was attempting to sell them; Mellison was with him. It may well be said there was evidence showing that Fowler and Mellison constituted another group. The jury, however saw fit to acquit Mellison.

Creed Lane, Tom Jones, Edward Bourdell, George E. White and C. H. Bellamy all worked together on the trains from which goods in interstate commerce were stolen. Some of these stolen goods were found in Creed Lane's house; some in Bellamy's house; some in Edward Bourdell's room; some in George E. White's house and some in the caboose on the train, which was under the care and control of Thomas E. Jones as conductor. It might plausibly

he contended that it had been shown that these five constituted a group.

The evidence shows that Singer knew no one except Bourdell; that he purchased a stolen overcoat from Bourdell; the evidence would probably be sufficient to sustain the verdict against Singer had he been convicted of possessing an overcoat knowing the same to have been stolen from an interstate shipment.

Trepanier loaned the stolen drill to Ratcliff. The court, of course, granted him a directed verdict.

Joe Veagus was accused of speaking some meaningless words to Tom Jones in the freight yard at Auburn; he likewise, received a directed verdict of not guilt. In the house of Albert Bruce Paris some stolen goods were found. The court, however, held that there was no connection with the rest of the defendants and granted him a directed verdict.

The motion to compel the Government to elect should have been granted.

We have the anomalous situation here of Ratcliff pleading guilty and judgement being passed uponing for a conspiracy which his testimony shows and which all the evidence corroborated could have con-

tained no one except Ratcliff, Herbert William Hanson, Ethyl Hanson and David Jones. The only thefts that Ratcliff had anything to do with, as said before was the matting and the shoes. None of the other defendants were present at the time of these thefts; none of them knew anything about them; none of them ever had any of the goods in their possession; none had ever offered to sell any. One judgment certainly is not broad enough to include five or six groups that had nothing to do with each other; never had any criminal agreement; never committed any criminal acts together.

It is true that the Government was not bound by Ratcliff's testimony. Even after he had testified on behalf of the Government, the Government could have produced other witnesses to show that Ratcliff falsified when he said there were only four in his conspiracy. They could have introduced evidence to show there was others besides David Jones, Herbert William Hanson, Ethyl Hanson and William Ratcliff. This opportunity was open to them, but at no time did they ever meet it.

The plaintiff's in error now challenge the Government to point out in their brief any testimony that connected any of the defendants with William Ratcliff, except the persons that he named as being his

co-operators and fellow conspirators in crime, to wit: David Jones, Ethyl Hanson and Herbert William Hanson. There is no evidence in the case to show this.

The motion to compel the Government to elect should have been granted.

The conspiracy statute has indeed been given a broad application. It has sometimes been called a drag net to catch the innocent and the guilty, but in no case has it ever swept so broad a surface as in this case. We have seventeen defendants going to trial with a final result of five convicted. The mere statement of the proposition shows that something was fundamentally wrong somewhere. The thing that was wrong was that a number of persons, whom the evidence shows may have been guilty of the crime of stealing property, composing parts of inter-state shipments, or a number of groups of persons who were stealing property, were all linked together, without any connection in fact. No evidence was introduced to connect them.

The motion to compel the Government to elect should have been granted. It was reversible error to refuse to grant it. The motion for a directed verdict as to Fowler should have been granted and of

course if the motion for a directed verdict should have been granted, the verdict should be set aside because there is no evidence to support it.

The error in refusing to grant the motion for a directed verdict, the motion being made at the close of the Government's case, and again at the close of the defendants' testimony raised the same question, and the plaintiff's in error will treat the assignment based upon these points simultaneously.

The plaintiff in error, Fowler challenges the Government to point out to this honorable court who stole the tires found in his possession; when were they stolen; what connection did any of the other defendants outside of James Francis Mellison, who was acquitted, have to do with the tires, or with Fowler. What connection did Mellison, who has been acquitted, have to do with any of the other defendants, Ratcliff, Mellison and Fowler were arrested at one and the same time and Ayers, the railroad detective, as explained, testified for the Government, and his testimony is not only uncontradicted, but is supported by all the other testimony in the case, that he, for the matter of convenience, decided to expose two piece of thievery at one and the same time.

One automobile, in which were Ratcliff and Ay-

ers, contained the shoes. Ratcliff's testimony and all the testimony shows Fowler had never seen the shoes until he saw them in the garage at Renton at the time of his arrest. Shoes, the Government proves beyond a doubt were stolen by Hanson and Ratcliff, and which the jury refused to believe, Ethyl Hanson and Dave Jones were implicated in.

It would be a strange doctrine of criminal law, that because an officer decides to arrest two alleged thieves at one and the same time, each in possession of different property, property stolen at different times and different places with no connection between the thieves, that there would be evidence to sustain a conspiracy charge between the two apprehended thieves.. Throughout the entire trial, Fowler and the tires stood alone, separate and distinctly, unconnected with anyone. When and how he came into possession of the tires was never explained; who gave them to him was never explained; where they were stolen was never explained; where they were before Fowler had them in his automobile was never explained. There is no evidence connecting Fowler with any other stolen property. None other was found in his possession. There was no conversation between him and the other defendants. There was no connection; no partnership. Ayers learned

through a railroad man that Fowler had some tires; Ayers decides that they were stolen; he gets the information from a conductor, not a defendant in this case, or not implicated in any of the criminal acts in any way. Ayers lays a trap for Fowler and catches him. It is true he laid a trap at the same time to catch Ratcliff and his group.

Fowler, from the evidence was undoubtedly guilty of an offence. The offence of having received property stolen from inter-state commerce, knowing the same to have been stolen. If he had been convicted of that offence, this argument would not be tenable in his behalf, but instead of that he was convicted of a conspiracy without any evidence showing that he had ever been connected with any other person in this case or in the world to steal property that was being shipped in inter-state commerce.

The mere fact that he is guilty of a different crime than conspiracy lends no support to the claim that a judgment finding him guilty of conspiracy should have been sustained. If the Government can point out a single piece of evidence that in any way connects Fowler with any individual in this case, or any other property except the tires, or connects any other person in the case with the tires, then there may be some fallacy in this argument. It is undoubt-

edly true that one may be guilty of a conspiracy with persons that he has never met or that he has never known. Still there must be a connecting link between him and the unknown. There must be some person in between who knows the other, and acts as a connecting link in the criminal design, criminal plan or criminal operation, but this one is wanting here.

An analysis of the testimony, together with a verdict of the jury, leads one to the conclusion that the jury convicted each and every person, who had in his possession any great amount of stolen property and acquitted every person who had no stolen property, or had stolen property of very little value.

Ratcliff, of course, was convicted on his plea of guilty; Hanson was convicted upon Ratcliff's testimony; Creed Lane had a roomful of stolen property, he was convicted. Fowler had an automobile full of stolen tires, and he was convicted, but between Ratcliff's and Hanson's matting and shoes, Jones roomful of merchandise, Fowler's tires and Bourdell's merchandise there was no connection whatsoever.

The case against Singer differs in no way from that against Fowler from a legal standpoint, except

that it was proven that Singer purchased a stolen coat from Ed. Bourdell and that he introduced Ed. Bourdell as a man who had shoes to sell. There was no evidence in the case to negative the idea that the shoes that Ed. Bourdell was selling were honestly come by. There is no contention that the shoes were stolen from an inter-state shipment. The testimony had only probative value to the effect that the relationship between Bourdell and Singer was intimate.

The Government concedes that Singer never actually stole anything. That he never did anything but receive this coat. This under no interpretation of the law would be sufficient to convict him of being a party to a criminal agreement to loot box cars. The person who steals property and the person who receives it, knowing it to have been stolen, do not stand in the relation of conspirators.

They are both guilty of a separate offence. One of larceny for the actual theft and the other of having received stolen goods, knowing them to have been stolen, which may or may not be larceny, depending upon the statute. The elements of the offences are different. The facts that prove one do not prove the other. Of course, the person

that possesses property, knowing it to have been stolen, and the person who actually stole it, may have been in a criminal agreement to steal it; the evidence may establish this fact beyond a reasonable doubt, yet it takes evidence to do it. The proof that one steals property, another is in possession of it, raises no presumption that there was an agreement or confederation or combination between the possessor and the thief for the stealing of the property.

The first assignment of error is more or less related to assignment 2, 4 and 5. That the Government in calling Ratcliff as a witness after he pleaded guilty and by passing judgment and sentence upon him, confined themselves to the conspiracy of which he, Ratcliff, was guilty, is a proposition that carries with it its own proof. The idea that a defendant can plead guilty to a conspiracy, be sentenced and that other defendants can be included in the same judgment that in the Government's own testimony and all the testimony in the case had nothing to do with the crime to which the plea of guilty was entered, is novel and unsound.

Sixth, Seventh, Eighth Assignments of Error

The sixth assignment of error, the seventh and the eighth assignment of error may be

all grouped together. The defendant, Sarah Lewis, testifying in her own behalf, took the witness stand before Fowler did. Fowler had offered no testimony in his own behalf and the other defendants in offering their testimony had not connected him in any way with themselves or with their transactions. At that time the reputation of Fowler and his credibility were not at issue. He had not offered himself as a witness. Mrs. Lewis was asked the following questions:

“Q. Do you know Lemuel Fowler? A. Yes.

Q. How long have you known him?

A. Oh, ten years, I should judge; nine or ten years.

Q. At Auburn?

A. At Seattle and Auburn.

Q. How long has he been a roomer at your hotel? A. Ever since he has been in Auburn.”

To this point the inquiry undoubtedly was proper; it was proper to show the acquaintanceship between the defendants. However, from this point on the inquiry was improper and grossly prejudicial.

“Q. You knew he was arrested, charged and convicted of stealing during that time?

Mr. DORE—I object to that as incompetent, irrelevant and immaterial.

Mr. SAUNDERS—I think, your Honor, we have a right to ask.

The COURT—Objection overruled.

Q. Answer the question please.

A. Yes, I did."

Amendment V. to the constitution of the United States reads as far as applicable to this assignment as follows:

"Nor shall be compelled in any criminal case to be a witness against himself."

The most effective way to compel a defendant who wishes to avail himself of the benefit of this amendment to be compelled to forego it is to introduce testimony in advance of his offering to testify that he has been previously convicted of crime. No such tactics as were employed in this case can be allowed if the constitutional guarantee is to be allowed to stand.

By this testimony, Fowler was forced on the stand. The rule against allowing a first conviction to be proved against a defendant before he testifies in his own behalf finds its main reason for its existence in this country in protection of the defendant's constitutional right to remain silent. The mere fact that the conviction may have been a fact—or

that it is afterwards wrung from the defendant when he takes the stand does not cure the error. It is a club with which he is driven to the stand. It is a court room third degree. A declaration of the prosecution "Well, if you think you are going to remain silent you are mistaken. We will show your criminal record. We will make you through fear take the stand."

It certainly was not competent until Fowler had taken the witness stand and placed his credibility in issue. It could have no other effect than to prejudice the jury against Fowler in advance. It was introduced at the time it was for the purpose of getting to the jury the fact that Fowler had at some previous time been convicted of stealing; whether the stealing constituted grand larceny or petit larceny was not pointed out.

A defendant's credibility cannot be called into question by proof of his conviction of crime prior to the time he takes the witness stand. This proposition is elementary. The reason for it being that the defendant may be entirely innocent of the crime for which he is being tried but may have a long criminal record. He may be led to refrain from taking the witness stand in his own behalf in order to keep from the jury the fact that he had been con-

victed of a crime, and risk by his silence an imputation of guilt rather than to disclose his past. The law allows him this privilege. If it were permissible for the prosecution to, by direct examination, elicit his criminal record before he took the witness stand, he would practically be forced upon the witness stand to explain not only the offence of which he was charged, but his past record.

Seventh Assignment of Error.

The seventh assignment of error occurred when Fowler himself was a witness. The question was (Tr. of Record p. 71).

Q. You left the employ of the N. P. in 1917?

A. Yes, sir.

Q. Under conviction of theft from cars?

Mr. DORE—I object to that as incompetent, irrelevant and immaterial.

Q. And you left the employ of the N. P. when you were convicted of theft from box cars?

A. I plead guilty of petit larceny, yes, sir.

Q. From a box car? A. No, sir.

Q. From the railroad. A. No, sir.

Q. From what then? A. For having the goods in my possession.

Q. That came from the box cars, stolen

goods? A. They came from the box cars.

Q. I am asking you, you plead guilty to having stolen goods in your possession? A. Yes, sir.

Q. And you have not been in the railway's employ since?

A. No, sir.

The Court refused to pass upon the objection. If the objection was not well taken, or course, no error was committed in the court failing to pass upon it, although it would have been not improper for the court to have done so. If, however, the question was objectionable and the proper objection was made, the Court, by its refusal to rule, compelled the witness to answer, then an error was committed. The only question that would affect the credibility of the witness was whether or not he had been convicted of larceny, a felony; a conviction of petit larceny would not affect his credibility.

Secondly, even if the question had been as to whether he had been convicted of grand larceny the prosecution would have been estopped from going any further. The only purpose in pursuing the inquiry further as to whether the goods of which the defendant had pleaded guilty of possession, knowing them to have been stolen, came from box-cars, was to

induce the jury to deduct from this prior conviction the probability that in the present case he was guilty of a similar offence. This is not permissible. A defendant on trial for picking pockets may have been convicted before of picking pockets. It is proper to inquire if he has been convicted of larceny or grand larceny. It is, however, improper to convey to the jury the impression that he is guilty of picking the pocket for which he is on trial by asking him if he has been found guilty prior to picking another pocket. Juries are prone to reason from a past conviction of a similar offence, identical in commission to guilt for a present offence.

In *State v. Gottfreedson*, 24 Wash. at page 399, we find this practice held error. The defendant was on trial for horse stealing. The court says:

“We think, however, the court erred in compelling the defendant, who offered himself as a witness, to testify that he had been convicted of horse stealing, the statute provides that no person offered as a witness shall be excluded from giving evidence by reason of the conviction of a crime, but such conviction may be shown to affect his credibility. When it was shown that the defendant had been convicted of a crime, the demands of the statute had been met; for the purpose of the statute is only to affect the credibility of the witness, and not to

prejudice the minds of the jury by parading before them the fact that the witness had been guilty of the exact crime for which he was then on trial. The tendency of such testimony as that on the minds of the jury would not be so much to affect the witness's credibility as to cause the jury to conclude that, because he had been before convicted of horse stealing, the probabilities were that he was guilty of stealing the horse in question."

Tenth Assignment of Error

The Tenth Assignment of Error relating to the objection assigning error because of the form of judgment should be sustained. The plaintiffs in error were sentenced to eighteen months concurrently on each count and \$500 on each count, making an aggregate of \$1500.

Of course, if the plaintiffs in error were sentenced to 18 months on each count, the sentence to run concurrently, if one count was good, the objection would have to be valueless. However, the levying of a fine of \$500 upon each count makes it a matter of financial importance to the plaintiffs in error as to whether the objection should be sustained as to one, two or three counts. Count 1 states briefly that the defendants violated the conspiracy statute

by conspiring to violate section 1 of the Act of Congress, approved Feb. 13, 1913, entitled, "An act to punish the unlawful breaking of seals of railroad cars, containing inter-state or foreign shipments; the unlawful entering of such cars; the stealing of freight or express packages, or baggage or articles in process of transportation in inter-state shipment and felonious transportation of such freight or express packages or baggage or articles therefrom into another district of the United States, and the felonious possession or reception of the same.

The alleged overt acts to count 1 set out in the indictment cover twenty-five pages of the record, pages 2 to 25.

The second count charges that the defendants on the same dates as on count 1 conspired together to violate sec. 35 of the penal code of the United States, as amended by the Act of Congress, approved Oct. 23, 1918, again making it a felony to steal the property of the United States Government. The overt acts are not set forth in full in this count, but it is stated that they are the same as in the first count.

Count 3 of the indictment alleges that the same defendants were guilty of conspiracy under the conspiracy statute itself, without reference to

any other statute, in that they conspired to defraud the United States in the manner and by the means following, to wit: That they, the said conspirators, and each of them, should and would knowingly, feloniously take, steal, carry away, purloin, embezzle and convert to their own use certain goods, wares, merchandise, chattels and property then and there moving as and constituting a part of certain shipments of freight and express on and over certain routes and system of transportation, then and there under Federal control, the said goods, wares, merchandise, chattels and property then and there being in the possession of the U. S. as a common carrier of goods for hire; and also certain tools, equipment and property, then and there used in the maintenance and operation of certain railroad routes and transportation systems then and there under Federal Control".

No overt acts are set forth in detail in this count. However, it is alleged that they are the same and identical with those set forth in the first count of the indictment. So the indictment itself charges that by the same overt acts the defendants committed three separate and distinct conspiracies. Whatever may be said of the indictment, there was no attempt upon the trial to show three separate and

distinct conspiracies. It was the contention of the Government that there was one conspiracy; that is, one criminal agreement, and this criminal agreement, singular in itself, was to do acts that were violative of three separate and distinct statutes of the United States. It needs no argument and no authorities to sustain the position that a criminal agreement unified and singular to do acts violative of a number of laws is one conspiracy and not as many conspiracies as there are statutes to be violated. A single agreement among a group, or an agreement to which a number of persons become participants, violative of a hundred statutes is still one conspiracy, and this is true even though the crimes that are to be committed are not similar. An agreement to murder, to rob and to steal, entered into by a band of criminals, as long as the agreement is singular, is one conspiracy and not three conspiracies. Again we request the Government to point out any evidence to this court that tends to show that Ratcliff, together with his co-operators ever had but a single agreement to violate the statutes of the United States. The judgment in this case upon one count cannot be sustained against any of the defendants. cannot be sustained against any of the plaintiffs in error. The judgment against Ratcliff could

have been sustained upon only one count of this indictment. Even were the facts sufficient as against the plaintiffs in error to sustain a conviction of conspiracy, a judgment could only be entered upon one count, as there was no proof of more than one agreement.

Section 37 of the penal code, defining conspiracy, is as follows:

“If two or more persons conspire to commit an offence against the United States or to defraud the United States in any manner, or and one or more of such parties do an act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000.00 or imprisoned for not more than two years, or both.”

Assignment of Error

Three

Assignment of Error three is to the Court's refusal to sustain the demurrer made to each count separately (Record 31-33).

Although this assignment relates to the demurrer, yet the assignment also sustains plaintiffs' in error contention that a verdict of not guilty should have been granted to Count II. and to Count III.

The demurrer was properly overruled as to count one of the indictment. Count two, however, purports to charge a conspiracy to violate Section 35 of the penal code of the United States, as amended by Act of Congress approved October 23, 1918. The part of the statute alleged to have been violated is included in these words:

“The taking, carrying away, or taking for his own use or for the other, with intent to steal or purloin any personal property of the United States or any branch or department thereof and any corporation in which the United States of America is a stockholder.”

The property that it was alleged that the conspiracy was formed to purloin was property of the United States, according to the pleading, because it was being transported in inter-state commerce, and at that time the inter-state commerce carriers were under the control of the Director General of Railroads.

Count three was drawn under Section 37 itself, making it a crime to defraud the United States, and the fraud which it was alleged the conspiracy was formed to perpetrate upon the United States was the stealing of tools and equipment belonging to the railroads while they were under federal control.

That the railways and equipment were not the property of the United States, so as to bring it under Section 37 of the statute, has been decided in the case of *Salas v. United States*, 234 Fed. 842. Quoting from the syllabus:

“When the United States enters into commercial business, it abandons its sovereign capacity, and is to be treated like any other corporation; therefore, though it absolutely owns the Panama Railroad Company, and is the only one profiting or losing by the railroad company’s activities, a conspiracy to defraud the railway company is not a conspiracy to defraud the United States, denounced by Penal Code (Act March 4, 1909, c. 321) par. 37, 35 Stat. 1096 (Comp. St. 1913, par. 10201), and in such case the United States can gain redress only by suit by the railroad company to recover damages.”

In the *Salas* case it must be noted that the Government owned all the stock of the corporation that owned the Panama Railway. Federal control of the railways by the United States under act of Congress did not vest in the United States as great a proprietorship as that of the Panama Railway Company. The conspiracy to steal properties of the railways while under Federal control, as charged under count two, and conspiracy to defraud the

United States government by the taking and stealing of tools and equipment from the railroads while under Federal control, are acts that are not within the purview of either the conspiracy statute itself or of the statute that makes it a substantive offence to steal property of the United States. The railways were not the properties of the United States, as that word is used in Section 35 of the penal code of the United States as amended by Act of Congress approved October 23, 1918, and a fraud perpetrated upon the railway's management while under the control of the United is not such a fraud as is denounced by Section 37 of the penal code.

The demurrer interposed to count two and count three was well taken and should have been sustained. It was error to overrule it.

At the close of the Government's case and at the close of the defendant's case the motion to direct a verdict of not guilty, being directed to each count of the indictment separately, should have been sustained as to count two and three. The evidence had shown that the Government had no interest in any of the property, except that it was operating the railway and, as operator, was transporting the goods. The evidence al-

so showed that all the goods and equipment belonged to the railway company and not to the Government. There was an absence of any proof to show that the Government had any interest in the shipment or in the equipment or tools of the railroad, except the fact that the railways were under federal control.

The same legal reasons that made it necessary to sustain the demurrers made it necessary to sustain these motions.

The judgment as to plaintiff in error Fowler should be reversed.

The judgment as to the plaintiff in error Singer be reversed.

Respectfully submitted,

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of Seattle, Washington,

Attorney for Plaintiffs in Error.

**In the United States Circuit
Court of Appeals for the
Ninth Circuit**

LEMUEL S. FOWLER AND THOMAS
SINGER,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

No. 3597

*Upon writ of error to the United States District Court
of the Western District of Washington, Northern
Division.*

BRIEF OF DEFENDANT IN ERROR.

ROBERT C. SAUNDERS,
United States Attorney.

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In the United States Circuit Court of Appeals for the Ninth Circuit

LEMUEL S. FOWLER AND THOMAS
SINGER,

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vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

No. 3597

*Upon writ of error to the United States District Court
of the Western District of Washington, Northern
Division.*

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

Plaintiffs in Error, Fowler and Singer and other codefendants not now before this court, were indicted on three counts under Penal Code Section 37, for the crime of conspiring. Count 1, to violate Section 1, of the Act of February 13, 1919, prohibiting the breaking of seals of railroad cars containing interstate shipments, the entering of said cars and stealing

therefrom articles in interstate commerce and the possession of such stolen goods; Count II, to violate Section 35 of the U. S. Penal Code, as amended by act of Congress October 28, 1918, by actually stealing and possessing such interstate shipments. Count III, to defraud the United States by taking, stealing, carrying away, purloining, embezzling and converting to their own use such interstate shipments of merchandise from the railroads while they were within the control and under the operation of the United States.

To the indictment thus filed, defendant William Ratcliff, not here appealing, pleaded guilty and was duly sentenced. Defendant Edward Bourdell changed his plea from not guilty to, guilty, during the progress of the trial, went to his room in a hotel in the town of Auburn, and committed suicide. (Brief of Plaintiffs in Error P. 57).

Defendant Creed Lane was convicted and is now serving a term in the Federal penitentiary.

Herbert William Hanson was convicted and is also serving a term in the Federal penitentiary.

Defendant Thomas Singer was also convicted and is here appealing, together with defendant Lemuel S. Fowler, so that this appeal concerns only the defendants Singer and Fowler, the other defendants not

having appealed at all, or having abandoned the appeal as shown by the record.

While the indictment is for conspiracy in three counts it could readily have been for the same crime in one count combined and stating the various offenses that the defendants had conspired to commit, but it is of no consequence to the appealing defendants that three counts, instead of one, are alleged in the indictment.

The assignments of error as incorporated in the record and urged in the brief, to the effect,

1. That the Court erred in permitting testimony under the indictment not conformable to that of defendant Ratcliff who had entered a plea of guilty to the entire indictment.

2. That the court erred in not striking such testimony.

3. That the court erred in over-ruling the demurrer interposed to each count of the indictment.

4. That the court erred in refusing to compel the government to elect at the conclusion of its case upon what conspiracy it would rely for a conviction.

5. That the court erred in denying a motion for a directed verdict for each of the defendants.

6. That the court erred in receiving the evidence of the defendant and witness Sarah Lewis. (Tr. P. 69-70).

ARGUMENT.

Discussing the errors in the order in which they are presented in the behalf of plaintiffs in error, we find that their alleged errors one to five inclusive, are for convenience, presented in the brief in one group, (Brief of Plaintiffs in Error, p. 50).

Since this group of no means raises the same question, Defendant in Error has some difficulty, as the court will, in ascertaining the precise point intended to be presented especially since assignment 5 in itself is duplicitous, vague and uncertain and seems to attempt to strike at several supposed defects in the indictment and the evidence, or in both.

Seeking to attach some undiscoverable importance to the ruling of the court in the following language, "I cannot rule of what the evidence shows in advance of hearing the evidence. Objection overruled", (Tr. p. 101) only an involved argument appears for the basis of this ruling, which, in fact, is no ruling at all upon which error can be assigned. (Tr. p. 100) (Brief of Plaintiffs in Error 51-2).

Plaintiffs in Error proceed to admit that this rul-

ing was undoubtedly correct (Brief of Plaintiffs in Error P. 52) thus leaving no ground for dispute or debate.

Seeking to follow the argument of the Plaintiffs in Error on this point we find many admissions of guilt of these appealing defendants, (Brief of Plaintiffs in Error 55-61-3-4-9) but we find no further attempt to relate the argument to an assignment of error until we come to the calm assertion (Brief of Plaintiffs in Error P. 64-6) that the motion to compel the government to elect should have been granted.

To elect to do what?

Much stress seems to be laid upon this assignment by way of repetition. We find it made on page 64 once and on page 66 twice, each time in the same language.

Of course a discussion of assignment 3 need not be pursued because the Plaintiffs in Error do not themselves present any argument to support assignment 3, to the effect that the court erred in overruling a demurrer to the indictment, it being a self evident fact that the demurrer could not have been sustained under any known theory of law.

It is also worthy of observation that the brief

utterly refrains from citing any authority to sustain any of the bizarre argument advanced.

It has been held many times that no direct evidence is necessary to establish a conspiracy, or that a formal agreement must be shown. It is enough if there are facts and circumstances in which the alleged conspirators are involved, separately or collectively, from which can be inferred a preconcerted action.

In *Davis v. U. S.*, 107, Fed., 753, it was contended that there was no evidence of conspiracy, and the Circuit Court of Appeals of the Sixth Circuit said:

“This might be so if it were necessary to prove the combination by distinct and formal agreement. But, as we held in the case of *Reilley v. U. S.* (recently decided) 106 Fed. 896, this is not necessary. If the evidence shows a detail of facts and circumstances in which the alleged conspirators are involved, separately or collectively, and which are clearly referable to a preconcert of the actors, and there is a moral probability that they would not have occurred as they did without such preconcert, that is sufficient if it satisfies the jury of the conspiracy beyond a reasonable doubt. We have considered the evidence, and think it ample to convince the jury that there was a common understanding between the plaintiff in error and others in his neighborhood, some of whom are mentioned in the indictment.”

In *Reilley v. U. S.* 106 Fed., the same court held:

“It is also urged that the evidence did not justify the verdict in that there was no proof of

conspiracy to do what was done. As has been often remarked, it is not necessary that direct evidence of a formal agreement should be given in such cases. If the evidence of the separate details of the transaction as it was carried out indicates with the requisite certainty the existence of a preconcerted plan and purpose, that is sufficient; and we think the evidence was such as to warrant the verdict."

In *Douglas v. U. S.* 169 Fed. 625, the same objection was raised by the plaintiff-in-error as is raised here, and the Court said:

"If it was intended by the objection just mentioned to insist that Doyle's connection with the scheme should be first shown, there are two answers: First, that enough had already been proven to warrant the belief that Doyle was involved in the scheme; and, secondly, there is no hard and fast rule that the evidence of concert should be first put in. The substance of the rule is that the jury must be satisfied that the concert existed before they can consider what one of the parties did or said in carrying out the joint purpose. In overruling the objection, the court very properly instructed the jury as to what the rule is. Besides, the order of production of evidence is one largely in the discretion of the court. But, further, as has been observed in many instances, probably in most, direct proof of the formation of the plot is not obtainable. Such plots are usually formed in secret. The existence of preconcert may be inferred from the subsequent conduct of the parties."

Chadwick v. United States, 141 Fed. 225;
United States v. Benson, 70 Fed. 591.

The plaintiffs-in-error, not having assigned any error on the instructions given, it must be assumed that they were correct, and if the Court correctly stated the law as above set out, we submit that there is nothing to plaintiffs-in-error's first five assignments, as argued in their brief because, primarily, under the law as we understand it, this question was one of fact and one that the jury alone could pass upon, and having passed upon it and found that the plaintiffs-in-error were in such a conspiracy as is set out in the indictment, it is now not open to debate.

However, coming to the next assignments, we find the sixth, seventh and eighth (6-7-8) grouped together for discussion. Since the transcript shows nothing further than a general objection upon the general grounds as incompetent, irrelevant and immaterial, no exception saved, it is unnecessary to pursue the discussion of the so-called sixth (6) and seventh (7) assignments. It is enough to say as to the sixth, that the witness Sarah Lewis also was a co-defendant, was a hotel keeper and kept an apparent rendezvous for some of the conspirators and was also a close personal friend of her co-defendant Fowler, and she had voluntarily testified as to his rooming with her. In this situation the government merely inquired as to her knowledge of

the facts known to her about the character of her roomer and her close friend and co-defendant.

As to the 7th assignment, the cross-examination objected to as unfair to Fowler and unlawful under the constitution, is no more than an inquiry of the circumstances under which he left the employ of the Northern Pacific Railway Company from which he stood accused of conspiracy to steal goods. Furthermore on the evidence in this record, the Plaintiff in Error Fowler, defendant below, stands not only charged but convicted by all the evidence including that of the witness and defendant Ratcliff of being present at the negotiating of the sale of stolen goods in connection with defendants Ratcliff, Hanson, Mellison and witness Ayers, (Tr. pages 90-1-106-8-9-190-91).

The 9th assignment of error is not discussed by the Plaintiffs-in-Error in their brief and therefore may be disregarded.

The 10th assignment of error only complains of the overruling of the motion for a new trial, an insufficient ground, as has been held so often the citation of authority is unnecessary.

We find no discussion by the Plaintiffs-in-Error of the 11th and 12th assignments of error, and in fact none could be predicated upon them.

There is found throughout the brief some general discussion of alleged legal principles thought to be of advantage to the Plaintiffs-in-Error, but in view of the entire evidence it is impossible to perceive the relevancy of such discussion.

To review the contentions of these Plaintiffs-in-Error, defendants below, we find they revolve themselves as follows:

1. A challenge to the sufficiency of the indictment, but we find the indictment so clearly good as written that its sufficiency cannot be successfully attacked, and in fact, as we find the argument, no serious attempt is made to attack it as an indictment, but some error is thought to be based upon the indictment and the evidence offered and received thereunder. At this point, even if there were anything in the argument that the conspiracy first described by the defendant Ratcliff, is the only one on which the government can rely, it is shown by that evidence that Fowler was an active member of the conspiracy, because he appeared at the midnight sale intended to be conducted at Renton, and was particeps criminis with the rest of the conspirators found there that night seeking to sell some of the loot which had come into their possession and in which he was interested along with the other conspirators seek-

ing to sell other parts of the loot which had fallen to their share.

Counsel for the plaintiffs in Error seems to think that not only is the government limited by the scope of Ratcliff's testimony but also by its scope in part and also is limited by the defendant Fowler's testimony, who though admitting himself to be present at the time and place the conspirators met to dispose of the stolen goods, denies he is a member of the conspiracy, a most fallacious argument on the part of the learned counsel of the Plaintiffs-in-Error who seems to think that the remark of the Honorable presiding Judge that he did not conceive it necessary for every conspirator to get into a conspiracy on the ground floor, was not founded in law.

2. Plaintiffs in Error next complain of some shadowy failure on the part of somebody to elect between the witnesses. We know of no such doctrine of law, the facts proven in any case, to be ascertained by the verdict of the jury and the jury to be the sole judge of the weight of the testimony admitted.

3. Again we find complaint with respect to denial of a motion for a directed verdict when the evidence taken as a whole to convict the defendants, not only of a conspiracy but the consummated crime, and especially

is this true of the two defendants now seeking relief by process of appeal.

This conspiracy, like many other conspiracies, is proven by various and sundry fragments of evidence proceeding from the lips of various witnesses who were in some way or another connected with the general conspiracy of the looting of the general merchandise cars moving or having moved in interstate commerce and the conversion of such shipments as were successfully stolen to some one or another of the men and women interested in the general scheme of conspiracy.

It is a clear case of addition, division, silence and understanding to the effect, between all parties defendant servants of a carrier, and their associates, to enjoy the proceeds of such nefarious transactions as came their way and keep silent with respect to the acquisitions secured by similar nefarious conduct of others interested in the same general object, who happened to gain profit through their opportunities and thievish dispositions.

We think there is one final suggestion which must sweep away all of the entire argument of the Plaintiffs in Error and it is this—the defendant Ratcliff withdrew a plea of not guilty and pleaded guilty to the indictment and all the counts thereof. (Tr. P. 85). Later on in the trial the defendant Bourdell

withdrew his plea of not guilty and pleaded guilty to the indictment and all its counts, making two self-confessed conspirators and Bourdell, at least, is shown to have been intimately connected in all of his disposing transactions of the stolen property with the defendant Singer, and that the evidence shows that Singer had some of the stolen property in his possession (Tr. P. 132), and the evidence is amply sufficient to show that Singer and Bourdell intimately associated themselves in a design and proposition to procure and dispose of these stolen goods, so on no theory can Singer be less guilty than his close associate and co-defendant Bourdell, (See Brief of Plaintiffs in Error, 57-9-60-1-2).

In final analysis we find Fowler connected with the conspiracy by his joint action on the night of the attempted sale of the stolen goods in the garage at Renton with his other co-defendants and we find Singer constantly associated with Bourdell in various illegal dispositions of stolen goods (Tr. p. 126-8), and we find Bourdell, who pleaded guilty, at times a member of the train crew composed of the self-confessed conspirator Ratcliff and the convicted conspirator Creed Lane. (Brief of Plaintiffs in Error, p. 58).

In law it is entirely unnecessary for all co-conspirators to know each other or to actually agree with each

other or to hold directors' meetings and take minutes of their actions. It is enough for a man to in any way be connected with the furtherance of the object of the conspiracy after its formation, by understanding, express or implied, growing out of the divers relations of the several parties to the alleged conspiracy.

The judgment in this case should stand affirmed as to both the plaintiffs in error, Lemuel S. Fowler and Thomas Singer.

Respectfully submitted,

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222 1265
No. 3497.

United States Circuit Court of Appeals

For the Ninth Circuit.

SOUTHERN PACIFIC COMPANY, a corporation,

Plaintiff in Error,

vs.

SOPHIA MARTINEZ, Administratrix
of the Estate of Carlos L. Martinez, Deceased,

Defendant in Error.

PETITION FOR A REHEARING

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Filed this.....day of March, 1921.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

FILED
MAR 1 1921
F. D. MONCKTON

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IN THE

United States Circuit Court of Appeals

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SOUTHERN PACIFIC COMPANY, a corporation,

Plaintiff in Error,

vs.

SOPHIA MARTINEZ, Administratrix
of the Estate of Carlos L. Martinez, Deceased,

Defendant in Error.

PETITION FOR A REHEARING

To the Honorable, the Judges of said Circuit Court of Appeals:

The plaintiff in error, Southern Pacific Company, hereby respectfully petitions, pursuant to Rule 29 of this Court, that a rehearing be granted herein. The judgment of the United States District Court for the District of Arizona was affirmed by this Court by an opinion filed herein on February 14, 1921, written by His Honor Circuit Judge Gilbert, and concurred in by Their Honors Circuit Judges Ross and Hunt.

We desire to urge three points:

(1) The nonapplication to the case of the provision of the Arizona Constitution: Sec. 5, Art. 18. "The defense of contributory negligence or of assumption of risk shall, in all cases whatever, be a question of fact and shall, at all times, be left to the jury."

(2) That the Cole case (251 U. S. 54) is not properly applicable because there was considered, whether such a state constitutional provision deprived defendant of a vested right and not, where as here, the case was tried de novo in a Federal court and the question is whether a state law can control Federal court procedure.

(3) That there was no evidence to the effect that the rails at the crossing projected above the road bed to a height of three or four inches.

This Court in its opinion says:

“The negligence of the driver, and of the plaintiff’s intestate in so attempting to cross the track might have sufficient to justify the Court below in directing a verdict for the defendant, but for the fact that the Constitution of Arizona provides:

‘The defense of contributory negligence or assumption of risk shall in all cases whatsoever be a question of fact and shall at all times be left to the jury.’

A similar provision in the Constitution of Oklahoma was under consideration in *Chicago, R. I. & P. Ry. Co. vs. Cole*, 251 U. S. 54, in which the constitutional provision was held to require the submission of the defense to the jury in a case where the plaintiff’s intestate stepped upon the railroad track when a train was approaching in full view and was killed.”

Also: “That there was evidence that the rails (at the crossing) projected above the road bed to a height of three or four inches, that the space between the rails was very rough.”

We respectfully submit:

(1) That there was no question of the contributory negligence of plaintiff’s intestate involved in the case.

(2) That the constitutional provisions referred to does not apply to cases of this character, but only applies to cases between master and servant.

(3) That the Supreme Court of Arizona has held that the constitutional provision referred to does not apply to this kind of a case.

(4) That the Supreme Court of Arizona has held, even in cases between master and servant, and notwithstanding the constitutional provision referred to, that, under certain circumstances, the question of negligence of the injured person is for the Court.

(5) That under the evidence in this case the question of negligence of plaintiff's intestate was one of law for the Court.

(6) That there is no evidence in the record showing that the rails (at the crossing) projected above the road bed to a height of three or four inches.

There can be no contributory negligence in a case unless it is pleaded by the defendant. The defendant in this case did not plead contributory negligence. It pleaded that the injuries were directly, immediately and proximately caused by the gross fault, negligence and carelessness of plaintiff's decedent himself, and not by any fault, negligence or carelessness on the part of the defendant or any of its officers, agents, servants or employees. (Tr. 23.)

The Supreme Court of Arizona in the case of *Consolidated Arizona Smelting Co. vs. Gonzales*, decided November 24, 1920, 193 Pac. 304, and being a case between master and servant, holds that such a plea does not amount to a plea of contributory negligence and that it was error for the trial Court to instruct the jury on the question of contributory negligence.

In that case the defendant pleaded that the plaintiff's carelessness, fault, negligence and improper conduct was the proximate and direct cause of his said injuries.

However, the Supreme Court of Arizona, in the recent case of *Twohy Bros. vs. Kepon*, decided November 24, 1920, 193 Pac. 296, has settled the question as to whether or not the constitutional provision referred to applies to cases other than cases between master and servant, and we quote here at length from the opinion of the Supreme Court of Arizona in that case.

"Where plaintiff, an experienced miner, injured while following a trail, by a blast on right of way being constructed by defendant, heard and understood the word 'Fire,' and immediately got into a safe position behind a wagon, but then in two or three minutes proceeded on his way in the open until the explosion occurred, five or six minutes after the warning, he was, under the facts, as a matter of law guilty of contributory negligence."

"Where the whole testimony and all legitimate inferences therefrom show injury to one by reason of his own want of ordinary care, his negligence is for the Court."

“BAKER, J.—This action was brought to recover damages for personal injuries sustained by the plaintiff on the 24th day of December, 1918, he having been struck by a stone that came from a blast set off by the defendant. The gravamen of the complaint was negligence, and the breach of duty alleged against the defendant was its failure to give plaintiff any notice or warning of the blast. The charge is couched in the following language:

‘The defendant, without any notice or warning to plaintiff, caused or permitted a high charge of said gun powder, dynamite, blasting powder, or other high explosive to be discharged.’

The defendant’s answer denied each and every allegation in the complaint, setting forth negligence on the part of the defendant, and affirmatively alleged that plaintiff’s injuries were the direct result of his own careless and negligent act. At the close of all the evidence in the case the defendant moved the Court for a directed verdict, but the Court denied the motion. This was error. The undisputed testimony, without conflict, established the following facts:

That at the time of the accident the defendant, Twohy Bros. Company, was engaged in the construction of a railroad road bed for the United Verde Tunnel Smelter Railroad Company near the town of Jerome, Yavapai County, Ariz.; that in the construction of the road bed it was necessary for the company to carry on blasting operations; which the company was doing when the accident happened; that between 4 and 5 o’clock on the day of the accident the plaintiff, Peter Kepon, and one Mike Racich, were returning from work at a lime quarry, some distance from the town of Jerome,

to their homes in said town, over a trail which passed in the vicinity of a fill and culvert being made by the defendant, known as the 500-foot level; that this trail was on land owned by the United Verde Copper Mining Company, and was used by men employed by the United Verde Copper Company in going to and from work at the lime quarry and other places; that when the plaintiff reached a point on the trail about 50 feet from a dump wagon near the trail, and about 500 feet, more or less, from the fill or culvert above mentioned, he heard some one cry 'Fire' once or twice; that it was five or six minutes from the time he heard the cry of 'Fire' until the explosion occurred; that he and the said Racich got behind the dump wagon, and stayed there for two or three minutes; that the plaintiff left the wagon, and had gone 150 to 200 feet, when the explosion occurred, and he was struck in the foot by a rock; that plaintiff at the time of the accident was 33 years old, and had been engaged in the mining business since he was 18 years old, and had a great deal of experience in handling dynamite and other explosives, and that he was familiar with the work being carried on by defendant at the place of the accident, and knew that they were doing blasting at that place, and knew the cry of 'Fire' was the warning of an impending blast.

In *Shearman & Redfield on the Law of Negligence*, vol. 3, par. 688a, it is said:

'Of course, a person who is warned that a blast is about to be made cannot voluntarily remain in a place of danger without losing his right of action if injured'—citing *Sullivan vs. Dunham*, 10 App. Div. 438, 41 N. Y. Supp. 1083; *Graetz vs. McKenzie*, 9 Wash. 696, 35 Pac. 377.

(1) Certainly, if he cannot voluntarily remain in a place of danger after being warned,

without losing his right of action, if injured, he cannot voluntarily leave a place of safety, after being warned, and go to a place of danger, and recover, if injured. The plaintiff was a miner of a great deal of experience in handling dynamite and other explosives, and was familiar with blasting; he heard the cry of 'Fire,' and well understood the import and meaning of the warning, and immediately went to a place of safety behind the wagon. He remained there a few brief moments, and then voluntarily left the place of safety, and went out into the open, and was injured by the explosion, which occurred within five or six minutes from the time the warning was given. The peril of going out into the open must have been obvious to any man of ordinary intelligence, much more so to an experienced miner familiar with blasting, yet the plaintiff of his own accord chose to abandon his secure position and challenge the danger by which he was injured. The defendant was not required to take better care of the plaintiff than the plaintiff took care of himself. Indisputably the cause of his injury was his own negligence.

(2) A case far less clear would suffice for the dismissal of the complaint. It is apparent upon the record that the plaintiff was timely warned of the impending blast, and that his injury was due to his own negligence and reckless act; hence he could not recover. Where the whole testimony and all legitimate inferences therefrom show that plaintiff was injured by reason of his own want of ordinary care, the question of his negligence is for the Court, and not for the determination by the jury. *Calumet & Arizona Mining Co. vs. Gardner*, 187 Pac. 563.

The judgment is reversed, with directions to dismiss the complaint.”

Even in cases between master and servant the Supreme Court of Arizona has held in a number of recent cases, notwithstanding the constitutional provision referred to, that, where the facts are undisputed, and the inferences can lead but to one conclusion, the question of negligence of the injured person is for the Court.

Calumet & Arizona Mining Co. vs. Gardner (Ariz.), 187 Pac. 563;

Consolidated Arizona Smelting Co. vs. Gonzales, supra;

Inspiration Cons. Copper Co. vs. Taylor (Ariz.), 193 Pac. 305.

In the case of *Calumet & Arizona Mining Co. vs. Gardner, supra*, the Supreme Court of Arizona, said:

“We think it was the clear and undoubted duty of the Court to grant the motion for an instructed verdict upon both grounds urged, and since in no view of the evidence is the plaintiff entitled to recover, the cause is remanded, with directions to dismiss the complaint.”

The constitutional provision under consideration is similar to the Oklahoma constitutional provision involved in the case of *C. R. I. & P. Ry. Co. vs. Cole*, 251 U. S. 54, but the construction given that provision by the Supreme Court of Oklahoma in

that case when it was before that Court, *Dickinson, Receiver of C. R. I. & P. Ry. Co. vs. Cole*, 177 Pac. 570, was not adopted by the framers of the Arizona Constitution, as the Cole case was decided by the Supreme Court of Oklahoma on December 24, 1918, and the constitution of Arizona was adopted December 9, 1910.

While the Supreme Court of Oklahoma in the Cole case, *supra*, did hold that such constitutional provision applied to a case where the plaintiff's intestate stepped upon the railroad track when a train was approaching in full view and was killed, the question as to whether or not such constitutional provision applied to such a case was not involved in the appeal of the case to the Supreme Court of the United States, as the only question raised on such appeal and the only question considered by the Supreme Court of the United States was as to whether or not such provision was in contravention of the 14th Amendment to the Constitution of the United States.

But in the Cole case as pointed out in our Reply Brief there was a substantial conflict in the evidence as to the negligence of the railroad company, and evidence that the train was running at a speed prohibited by ordinance of the city which constituted negligence *per se*. 177 Pac. 571.

The Supreme Court of Oklahoma in the case of *C. R. I. & P. Ry. Co. vs. Duran*, 134 Pac. 876, and in a case between master and servant, has held that this constitutional provision does not relieve the party suing for damages for an alleged injury from the burden of proving that the injury was the prox-

mate result of negligence on the part of the party sought to be charged; and that where there is no evidence reasonably tending to show that such party sought to be charged was guilty of negligence, it is error for the trial Court to submit such issue to the jury.

The Supreme Court of Oklahoma in the case of *St. L. I. M. & S. R. Co. vs. Gibson*, 48 Okl. 553, 150 Pac. 465, which was a crossing accident case, has held:

(Quoting from the syllabus)

“Where plaintiff’s evidence shows that deceased was standing to one side of the railroad track, in a place of safety, and knew that a train was approaching, and had waited to see the train pass, and suddenly attempted to run across the track, immediately in front of, and in full view of, a moving train, and was struck by the train before he could run across the track, the company could not be liable, and a demurrer to the evidence should have been sustained.”

“Where the employees of a railroad company, on approaching a crossing, fail to ring the bell and sound the whistle, if the evidence leaves a doubt as to whether the deceased saw the train, or knew that it was approaching, then the failure of defendant to ring the bell and sound the whistle would raise a question to be submitted to the jury as to whether or not that failure was the cause of his going upon the track, and thereby losing his life. But when plaintiff’s own evidence is that deceased had waited to see the train pass, knew it was approaching, and ran upon the track immediately in front of and in full view of the moving cars, it could not be said the failure to ring the bell and sound the

whistle was in any manner responsible for his going upon the track, and there is no question, on that phase of the case, to submit to the jury."

(Quoting from opinion)

"The defendant's liability in this case was based upon negligence. And if the defendant was negligent, and there was any evidence which reasonably tended to establish a causal connection between that negligence and the death of deceased, then it should have been submitted to the jury, but, if there was no such evidence, then it was error for the Court not to sustain the demurrer. In other words, if there was any evidence, that tended to show that the death of plaintiff's son was caused by the carelessness and negligence of the defendant, or that the defendant, after it discovered his peril, by the exercise of ordinary care and diligence could have prevented the accident and saved his life, then that evidence should have been submitted to the jury; but, if there was no such evidence, the Court should have sustained the demurrer."

"But there is one other question to be considered: Plaintiff's evidence developed the fact that the defendant did not ring the bell or sound the whistle on approaching the crossing where the deceased was killed. Then would that evidence, under the circumstances of this case, suggest a causal connection between the death of deceased and this failure of defendant? If the evidence had left a doubt as to whether or not deceased saw the train, or knew that it was approaching, then the failure of defendant to ring the bell and sound the whistle would have raised a question as to whether that failure was not the cause of his going upon the track, and thereby losing his life. But the plaintiff's own

witness testifies that deceased had waited to see the train pass, and ran upon the track with the train in full view. It cannot be said with any degree of reason that the fact that he ran upon the track was due to this failure of defendant."

"The rule of law is well settled that if the evidence of the plaintiff, with all the inferences which the jury could justifiably draw from it, fails to establish a cause of action on behalf of the plaintiff, it is the duty of the trial Judge to sustain a demurrer to the evidence, when interposed. We think the evidence in this case wholly fails to establish the plaintiff's cause of action, and that the demurrer should have been sustained.

We therefore recommend that the judgment be reversed, and the cause remanded, for further proceedings not inconsistent with this opinion."

In another crossing accident case, *C. R. I. & P. Ry. Co. vs. Barton*, 159 Pac. 250, the Supreme Court of Oklahoma held:

(Quoting from syllabus):

"Section 6, art. 23 (Williams') Constitution, providing that the defense of contributory negligence shall in all cases whatsoever be a question of fact, and shall, at all times, be left to the jury, does not take from the Courts the right to ascertain whether the three necessary elements of primary negligence exist, *viz.*: (1) The existence of a duty on the part of the defendant to protect the plaintiff from injury; (2) the failure of the defendant to perform that duty; and (3) injury to the plaintiff resulting from such failure."

“ ‘Contributory negligence’ is an act or omission on the part of the plaintiff amounting to want of ordinary care which, concurring or co-operating with the negligent act of defendant, is the proximate cause of the injury complained of, and necessarily presupposes negligence on the part of the defendant.”

The Supreme Court of Oklahoma in its opinion said:

“The acts of negligence relied upon for recovery are numerous, but the questions necessary for a determination of the controversy are: Was there any evidence offered reasonably tending to prove that the defendant was guilty of negligence? If guilty of such negligence, was it the proximate cause of the injury?”

“Plaintiff insists that since the Constitution (section 6, art. 23, Williams’ Con.) provides that the defense of contributory negligence shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury; that the Courts have not the right to inquire as to whether or not the negligence was the proximate cause of the injury, as this would require a determination of whether the party injured was guilty of contributory negligence. Contributory negligence is an act or omission on the part of the plaintiff, amounting to want of ordinary care, which, concurring or co-operating with the negligent act of defendant, is the proximate cause of the injury complained of, and necessarily presupposes negligence on the part of the defendant.”

“If therefore contributory negligence can never exist except where the injury resulted from the primary negligence of the defendant

as a concurring proximate cause, then it becomes the duty of the Court to first ascertain if the facts, as disclosed by the evidence, constitute primary negligence; if the essential elements of such negligence are not established, the defense of contributory negligence does not exist and would not be a question of fact for the jury under Section 6, *supra*.

Whether the facts in a given case constitute primary negligence, where the injuries are not willful and intentional, must depend upon whether the three essential elements of negligence are shown, *viz.*: (1) The existence of a duty on the part of the defendant to protect the plaintiff from injury; (2) the failure of the defendant to perform that duty; and (3) injury to the plaintiff resulting from such failure.

The cause should therefore be reversed and remanded for a new trial."

It was not the intention of the framers of the Constitution of Arizona that this provision should apply to cases other than cases between master and servant.

The provision appears in Article 18 of the Arizona Constitution, headed and entitled, *Labor (Rev. Sts. Arizona, 1913, p. 168)*.

Section 1 provides that eight hours shall constitute a lawful day's work, etc.

Section 2 refers to child labor.

Section 3 prohibits employers from requiring from employees contracts exempting employers from liability for personal injuries.

Section 4 abolishes fellow-servant doctrine.

Section 5 (the one under consideration) refers to contributory negligence and assumption of risk (of employees).

Section 6, refers to amount to be recovered by employee for personal injuries.

Section 7, provides that the Legislature shall enact an Employers' Liability Law.

Section 8, provides that the Legislature shall enact a Workmen's Compulsory Compensation Law.

Section 9 refers to "black list."

Section 10 (the last section), prohibits employment of aliens on public work.

In pursuance of this Article 18 of the Arizona Constitution, the Legislature of Arizona did thereafter enact what is known as the Employers' Liability Act, Chapter VI, Title 14, Revised Statutes of Arizona, 1913, and embodied the constitutional provision referred to, in Paragraph 3159.

"3159. In all actions hereafter brought against any such employer under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the question whether the employee may have been guilty of contributory negligence, or has assumed the risk, shall be a question of fact and shall at all times, regardless of the state of the evidence relating thereto, be left to the jury, as provided in Section 5 of arti-

a time when the safety gates at such crossing are not down, was or was not guilty of contributory negligence shall be a question to be determined by the jury, in all actions brought to recover damages.

On the trial in the United States District Court that Court gave peremptory instructions for the defendant.

Plaintiff contended that under the New Jersey statute referred to the Court was bound to submit the cause to the jury.

The Circuit Court of Appeals said:

“We do not understand the New Jersey statutes have abolished the defense of contributory negligence, or relieved the Court from deciding the question of law where it arises, whether the undisputed facts show a plaintiff is guilty of contributory negligence.”

“Regarding, therefore, such statutes as rules of procedure, it is clear that such rule of procedure, enacted in New Jersey, could not affect the procedure of a case litigated in the Court below, and therefore the District Court of the Eastern District of Pennsylvania had the right, and it was its duty, to hold that, if the facts clearly showed the plaintiff contributed to the accident, she could not recover. This duty it met, and the only question here involved is whether it erred in deciding that question as a matter of law and refusing to submit it to the jury.”

The judgment of the District Court in favor of defendant was affirmed.

III.

On the other question as to the condition of the crossing, we cannot help but think that this Court has inadvertently misinterpreted some of the testimony with reference to the crossing.

Plaintiff's allegation in the complaint as to the condition of the crossing is:

“and the defendant was further negligent in leaving rails of said crossing projecting above the ground or surface on either side of said track to a height of to-wit, five inches” (Tr. p. 4).

But the rails,, from base where they rest on the ties to the top of the ball, are only 5½ inches in height. (Testimony of F. R. South, Section Foreman, Tr. p. 92.)

The photograph (Tr. p. 121) which was taken immediately after the accident, and when the conditions were exactly the same as when the accident occurred shows conclusively that the rails did not project above the road bed to a height of three or four inches.

Testimony of J. A. Ford, Roadmaster:

“You have to have space there on the inside of each rail for the flange to run in.” (Tr. 90.)

“The crossing had been repaired three or four days prior to that and some rock put in at that time.” (Tr. 91.)

“The rails did not stick up four or five inches, they probably stuck up a half inch or so.” (Tr. 91.)

“There was practically a flush surface there except where the flange runs next to the rails.” (Tr. 91.)

F. R. South, the section foreman, testified:

“The tops of the rails at the crossing did *not* stick up above the material in between the rails four or five inches.” (Tr. 92.)

“The height of the rails there is five and one-half inches.” (Tr. 92.)

“I should say the rails were not sticking up above the ballast more than a half inch at most.” (Tr. 92.)

H. C. Ballard testified:

“I examined the crossing the next day after the accident. It was in very good condition. About half or two-thirds of the ball of the rail showed on one side, the other side was not so high—with the exception, of course, where the flange runs. Where the flange of the wheel of the locomotive and cars run next to the rail, there was a small space. On the inside it was very near as high as the rail. I drove over the crossing in an automobile the Friday before the accident and Monday night. The accident occurred Monday.” (Tr. 96.)

Robert Mackay testified:

“I was familiar with this crossing where this accident occurred. I saw it a couple of hours after the accident. The crossing was in good shape. The material in between the rails was higher than the rails. The rock and dirt in the middle of the track was higher than the rails. The space that was left for the flange about three or four inches from the rail was lower; but then further on, it was higher than the rail over to some distance until you get on the other

side. I crossed over this crossing after the accident in an automobile—had no trouble in crossing.” (Tr. 98-99.)

Y. T. Womack, plaintiff’s witness, testified:

“Had occasion to go over this crossing at different times—thousands of times. I never had very much trouble crossing it.” (Tr. 100.)

“I know this crossing was repaired a few days before the accident; I do not know how many days—filled in with ballast, crushed rock and more or less dirt with it.” (Tr. 101.)

John Bright, plaintiff’s witness, testified:

“Was acquainted with the crossing where this accident occurred. I crossed there in the evening of March 25, 1917, about two o’clock after the accident happened. I did not exactly examine the premises—the crossing when I crossed. It was rough—most of the time it was. The rails were a little high. It is up grade. You went up grade, going up to the crossing about four feet.” (Tr. 61.)

When Mr. Bright said here that “the rails are a little high,” he meant that the road bed of the railroad and the rails were higher than the surrounding country.

He further testified:

“There was not any boards on the crossing. Coming up to the rails on the outside, it was pretty well filled in, but the cars and trucks and things going over the crossing, you know, cuts it down in some places about where the wheels would run, you know, *but right in the middle between the rails where the cars would naturally run was fairly full*, you know, but there

were places in that track where the rails was down—the filling was down below the ball of the rail. Where the dust was below the ball of the rail.” (Tr. 61.)

“Q. Well, how much of the rails, if any, were extending above the surface, Mr. Bright? Tell the jury just how you found the rails and conditions there.”

“A. Well, it would be hard to say. It was not the same all the way; it would not be the same all the way. It was, as you say, where the wheels had cut, it would be a little deeper, you know. That space, it would be a little deeper there than it would a little further over where the wheels were not cutting so much, and right in the middle, in between the rails where the wheels did not run, the track was nearly full. They would cut down at the edges a little further below the ball of the rail, especially between the rails.” (Tr. 62.)

“Q. Mr. Bright, state the condition after you got in the center of the track, or after you got over one rail, state to the jury just what condition you found the second rail, whether it was flush or whether it was dug out.”

“A. It was not flush you know. All of the ball of the rail was showing there at the crossing.” (Tr. 62.)

Taking the most favorable view of the testimony of the witness Bright, for the plaintiff, it simply amounted to this: “that the dirt was below the ball of the rail, that all of the ball of the rail was showing there at the crossing, especially on the inside between the rails.”

It was absolutely necessary to leave a space on the inside of each rail for the flange way of the wheels of the locomotives and cars, in order to avoid derailing the trains. (Tr. 90.)

The flange way is what the witness Bright was referring to when he stated that all of the ball of the rail was showing on the inside of the rails. The ball of the rail on the inside would necessarily have to show, otherwise it would be very dangerous to run trains over the crossing.

There was no duty resting upon the defendant to keep the crossing so smooth and free from all inequalities that no jar or jolt would be caused by vehicles passing over the crossing.

St. L. & S. F. Ry. Co. vs. Dyer (Ark.), 113 S. W. 49.

In the case of *Peterson vs. C. M. & St. P. Ry. Co.* (Iowa), 170 N. W. 452, which was a case practically on all fours with the instant case, and was brought under a statute of Iowa which provided that "every railway shall construct, at all points where such railway crosses any public road, good, sufficient, and safe crossings," the Supreme Court of Iowa held that such statute did not impose upon the railway company the duty to make the crossing absolutely safe, but that all that was required was to make it reasonably safe for travel, and that an elevation of from two to three inches between the road surface and the top of the planks did not tend to show negligence, either in the construction or maintenance of the crossing.

IN CONCLUSION

We therefore respectfully submit that in view of the foregoing and especially in view of the very recent decisions of the Supreme Court of Arizona now called to Your Honors attention, a rehearing should be granted herein, and that the judgment of the District Court should be reversed and remanded with directions to enter judgment for defendant.

In the event this petition be granted we do not waive the other points for reversal made by plaintiff in error, but we believe the points we make in this petition to be sufficient to dispose of the case.

Respectfully submitted,

FRANCIS M. HARTMAN,
Attorney for Plaintiff in Error.

WM. F. HERRIN,
HENLEY C. BOOTH,
*Southern Pacific Building,
San Francisco, California.
Of Counsel.*

The undersigned one of the Counsel for Plaintiff in Error hereby certifies that in his judgment the foregoing petition is well founded and further certifies that said petition is not interposed for purposes of delay.

HENLEY C. BOOTH,

Of Counsel.

United States Circuit Court of Appeals

LEMUEL S. FOWLER AND THOMAS SINGER,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA
Defendant in Error.

Upon Writ of Error to the United States District
Court of the Western District of Washington,
Northern Division.

PETITION FOR RE-HEARING

JOHN F. DORE,
of Seattle, Washington,
Attorney for Plaintiffs in Error.

United States Circuit Court of Appeals

LEMUEL S. FOWLER AND THOMAS SINGER,
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vs.

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Upon Writ of Error to the United States District
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PETITION FOR RE-HEARING

JOHN F. DORE,
of Seattle, Washington,
Attorney for Plaintiffs in Error.



United States Circuit Court of Appeals

For the Ninth Judicial Circuit

LEMUEL S. FOWLER AND THOMAS SINGER,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA
Defendant in Error.

PETITION FOR REHEARING.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Come now the plaintiffs in error, Lemuel S. Fowler and Thomas Singer, and respectfully petition this court for a rehearing of this cause, decided by your Honors on the 16th day of May, 1921, and to that end respectfully show:

The court says:

“It is well settled that a formal agreement of the parties concerned is not essential to the formation of a conspiracy. It is sufficient if there be a concerted action of the parties, working together understandingly, with a single design, for the accomplishment of a common purpose.”

This correctly states the law of conspiracy. But we feel aggrieved, because it seems to us your Honors, after stating the law correctly, have failed to see it correctly applied. It appears to us the court has committed the very error the government committed in the court below, and in the application of the law has confused “concerted” action with “similar” action, and “common” purpose with “similar” purpose. To illustrate: Stealing constantly goes on in a city the size of Seattle. It is not uncommon for six thefts to occur in a single night. At other times a single theft may occur for a series of six nights. In either case the thefts *may be*, true, the result of a conspiracy. But not necessarily, or probably, so. Common character of the crime does not make it so, or even indicate it. Nor does time have any probative effect. The fact either that all occurred in one night, or that they occurred in a series of nights, has no force of proof.

There must be *concerted action*, an action *toward a common end*, an end common to all the actors, before a conspiracy can be said to exist. Your Honors will not disagree with us upon this point.

The evidence then must decide whether a series of thefts is a coincidence or the result of a conspiracy.

The theory of the government was well stated by the court:

“The theory of the government is plain, namely, that there was manifestly an organized group of evil-disposed persons, who had for their purpose the looting of freight and express trains and cars and the disposition of the spoils to avail themselves of the profits of their engagement. So it was that many persons were charged with conspiring to engage in the unlawful enterprise.”

But it is one thing to say of a series of thefts that they are the result of a conspiracy and quite another to prove the fact. The assertion is easily made. If the proof is difficult it is usually because the assertion is untrue.

It may be conceded without going further that larceny of goods from the railroad was practiced to no small extent in and about Auburn; that some of the defendants were guilty of these thefts; and that the government showed a conspiracy to have existed between two or more of the defendants. But the government did more. It showed several conspiracies. Starting with the theory of one grand conspiracy, into which it dragged the names of all the defendants, the proof it offered showed several distinct and independent thefts, connecting them sometimes, but not always, with two or more of the defendants, but no two conspiracies or thefts being connected together by any formal proof. That the facts actually shown failed to measure up to the government's theory of a grand conspiracy is shown conclusively by the action of the court in dismissing three of the defendants, after the evidence was in, and by the verdict of the jury in acquitting a majority of the remainder.

The lower court acted wisely in discharging the three defendants, and the jury made no mistake in acquitting those acquitted. On the other hand, some of those convicted were rightly convicted. But a wrong was done Singer and Fowler.

Tom Singer is a hairdresser and proprietor of a "beauty parlor" in the City of Seattle. Edward Bourdell, a railroad man living at Auburn, purchased from Singer in Seattle a wig, and in payment therefor gave him an overcoat. The overcoat was a stolen coat, though Singer professes not to have known that fact. If guilt must be predicated of him at all, he is guilty of receiving stolen property at most. But Singer stands convicted of a conspiracy to loot railway trains in and about Auburn! The explanation is not hard. Bourdell confessed in court his guilt *of looting*, went home and committed suicide! The jury, not given to too close reasoning, doomed Singer with him, not because either was in a conspiracy as charged, but because Bourdell was a thief and Singer had dealt with him.

It is important to him that the court consider well the point urged that the jury should have been restricted to a consideration of the conspiracy proved, and we respectfully ask a reconsideration of the point.

As to Fowler, it may be said with equal fairness, he is not guilty of the offense charged. He was in possession of certain automobile tires, shown

to be stolen tires. How, where or when he got them is not known, except as he told the story, which the jury evidently failed to believe. But the transaction with reference to the tires is the only one in which he was in any way involved. Ayers, the railroad, detective, learning of his possession of the tires, arranged to help him sell them, evidently figuring that such would involve Fowler criminally, but how is not clear. In arranging the deal he took Fowler and his tires to Renton at the same time that he took Ratcliff and Hanson with the shoes. Ratcliff pleaded guilty, and the jury convicted Fowler, though Ratcliff testified flatly that he had been in no conspiracy or dealings with Fowler, and no one else connected him with any other transaction. Fowler is not guilty, your Honors, unless living in a railroad community where thieving is pretty general makes all guilty of "conspiracy."

We respectfully urge a reconsideration of the record for these two petitioners.

Respectfully submitted,

JOHN F. DORE,

Attorney for Petitioners.

United States
Circuit Court of Appeals

For the Ninth Circuit.

JAMES A. RUSSELL,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the Western District of Washington,
Northern Division.

FILED
DEC 24 1929
F. D. MONCKTON,
CLERK.

United States
Circuit Court of Appeals
For the Ninth Circuit.

JAMES A. RUSSELL,

Plaintiff in Error,

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THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the Western District of Washington,
Northern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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[1*]

United States District Court, Western District of
Washington, Northern Division.

November Term, 1919.

No. 5260.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. A. RUSSELL,

Defendant.

Indictment.

The United States of America,
Western District of Washington,
Northern Division,—ss.

The grand jurors of the United States of America
being duly selected, impaneled, sworn and charged to

*Page-number appearing at foot of page of original certified Transcript of Record.

inquire within and for the Northern Division of the Western District of Washington, upon their oaths present:

COUNT I.

That J. A. RUSSELL (whose true Christian name is to these grand jurors unknown), on the thirteenth day of January, in the year of our Lord, one thousand nine hundred and twenty, in the city of Seattle, County of King, in the Northern Division of the Western District of Washington, and within the jurisdiction of the United States District Court, then and there being, with intent to defraud one Julius Taylor, unlawfully did then and there falsely assume and pretend to be an officer and employee acting under the authority of the said United States, to wit, a revenue officer and employee, and in such pretended character did fraudulently demand and obtain from him, the said Julius Taylor, a sum of money, to wit, the sum of Eighty dollars (\$80); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [2]

COUNT II.

And the grand jurors aforesaid, on their oaths aforesaid, do further present:

That J. A. RUSSELL (whose true Christian name is to these grand jurors unknown), hereinafter called the defendant, on the twenty-first day of March, in the year of our Lord, one thousand nine hundred and twenty, at the County of Snohomish, in the Northern Division of the Western District of Washington, and within the jurisdiction of the

United States District Court, then and there being, did then and there knowingly, wilfully, unlawfully, falsely and feloniously assume and pretend that he the said defendant then and there was an officer and employee acting under the authority of the United States and of the Department of Internal Revenue thereof, to wit, a revenue officer for the District of Washington, and in said pretended character of officer and employee as aforesaid he, the said defendant, with intent to defraud the United States, did then and there demand his immediate release from arrest then and there made and effected upon his body by one, to wit, William G. Vest, a duly appointed, qualified and acting federal prohibition agent of the United States for the State of Washington, for a violation of the National Prohibition Act then and there being perpetrated by the said defendant, J. A. Russell; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

ROBT. C. SAUNDERS.

United States Attorney.

[Indorsed]: Indictment for Violation Sec. 32, P. C. A True Bill. E. Shorrock, Foreman Grand Jury. Presented to the Court by the Foreman of the Grand Jury in open court, in the presence of the Grand Jury and filed in the U. S. District Court, April 28, 1920. F. M. Harshberger, Clerk. [3]

United States District Court, Western District of
Washington, Northern Division.

No. 5260.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. A. RUSSELL,
Defendant.

Arraignment.

Now, on this 3d day of May, 1920, into open court comes the said defendant, J. A. Russell, for arraignment, accompanied by his counsel Walter Schaffner, and answers that his true name is James A. Russell, whereupon the charge is read to him and he here and now is given two weeks to plead.

Journal 8, Page 253. [4]

United States District Court, Western District of
Washington, Northern Division.

No. 5260.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. A. RUSSELL,
Defendant.

Plea.

Now on this 7th day of June, 1920, into open court

comes the said defendant, J. A. Russell, and here and now enters his plea of not guilty to the charges herein against him.

Journal 8, page 328. [5]

United States District Court, Western District of
Washington, Northern Division.

No. 5260.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES A. RUSSELL,

Defendant.

Trial.

Now, on this 22d day of June, 1920, this cause comes on for trial and defendant, James A. Russell, is in court with his attorney, J. L. Finch. F. R. Conway is counsel for the Government. The Government announced that it elected to proceed with the trial of this cause on Count I. The defendant moves for dismissal of Count II but this motion is denied and exception allowed. The following jurors were examined, sworn and empanelled: William H. Silliman, John A. Pedersen, O. H. Halleson, Leander Miller, H. A. Eckas, Samuel H. Poynor, Ruel A. Russell, Willard O. Palmer, Henry A. Schaub, J. O. Strehlau, V. L. Elson and E. E. Rhodes. Statement to jury for the Government was made by Asst. U. S. Attorney Conway. Julius Taylor,

Henry V. Hanson and C. C. Klingel were examined and sworn as witnesses for the Government and Exhibit 1 introduced, at which time the Government rests. The defendant moves for a directed verdict on ground of insufficiency of Government's evidence, but this motion was denied. Statement to jury for defendant was made by J. L. Finch, and James A. Russell was examined and sworn as defendant's witness, at which time the defendant rests. The cause was argued to jury by both sides and the jury was instructed by the Court and retired for deliberation. The jury came into court at 2:10 P. M. and returned verdict of guilty on Count I, the defendant and attorneys for both sides being present. The verdict reads as follows: "We, the jury, in the above-entitled cause, find the defendant James A. Russell is [6] guilty as charged in Count I of the indictment herein. W. H. Silliman, Foreman." The verdict was ordered filed. Final disposition of case was continued until June 29, 1920. The jury was discharged from further consideration of the case.

Journal 8, page 361. [7]

In the District Court of the United States for the
Western District of Washington.

No. 5260.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES A. RUSSELL,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find the
defendant, James A. Russell, is guilty as charged
in Count I of the indictment herein.

W. H. SILLIMAN,

Foreman.

[Endorsed]: Verdict. Filed in the United States
District Court, Western District of Washington,
Northern Division. June 22, 1920. F. M. Harsh-
berger, Clerk. By S. E. Leitch, Deputy. [8]

United States District Court, Western District of
Washington, Northern Division.

No. 5260.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. A. RUSSELL,

Defendant.

Motion for New Trial.

COMES NOW the defendant in the above-entitled cause, J. A. Russell, by John F. Dore, his attorney, and moves the Court for an order setting aside the verdict of the jury heretofore rendered herein, and granting to defendant a new trial, for the reasons and upon the grounds:

- a. The verdict is contrary to the law of the case.
- b. The verdict is not supported by any evidence in the case.
- c. The Court upon the trial of the case, admitted incompetent evidence offered by the United States.
- d. The Court erred in refusing to direct a verdict of Not Guilty at the close of the Government's evidence.
- e. The Court erred in refusing to direct a verdict of Not Guilty at the close of all the evidence.

Dated this 28th day of June, 1920.

JOHN F. DORE,
Attorney for Defendant.

[Endorsed]: Motion for New Trial. Filed in the United States District Court, Western District of Washington, Northern Division. June 29, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [9]

United States District Court, Western District of
Washington, Northern Division.

No. 5260.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES A. RUSSELL,

Defendant.

Hearing on Motion for New Trial.

Now, on this 7th day of July, 1920, a motion was made for a new trial. This motion was argued and same was denied. The Government moves for judgment and sentence. Statement is made by attorneys. The defendant is sentenced at this time.

Journal 8, page 378. [10]

United States District Court, Western District of
Washington, Northern Division.

No. 5260.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES A. RUSSELL,

Defendant.

Sentence.

Now, on this 7th day of July, 1920, comes the defendant, James A. Russell, into open court for

sentence, and being informed by the Court of the indictment returned against him in this cause and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, he nothing says save as before he hath said. Wherefore, by reason of the law and the premises, it is **CONSIDERED, ORDERED and ADJUDGED** by the Court that the defendant is guilty of violation of Section 32, Penal Code, and that he be sentenced to be imprisoned in the King County Jail or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States for the period of three months, from and after this date, or until he shall be otherwise discharged by law, and defendant is now remanded into the custody of the U. S. Marshal to carry this sentence into execution.

Judgment and Decree Book No. 2, page 517. [11]

United States District Court, Western District of
Washington, Northern Division.

No. 5260.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. A. RUSSELL,

Defendant.

Petition for Writ of Error.

In the Above-entitled Court and to the Honorable
EDWARD E. CUSHMAN, Judge Thereof:

COMES NOW the above-named defendant J. A. Russell, and by his attorney and counsel, respectfully shows that on the 22d day of June, 1920, a jury impanelled in the above-entitled court and cause, returned a verdict finding the defendant above named guilty of the charge in Count I of the indictment contained, which indictment was theretofore filed in the above-entitled court and cause, and thereafter, and within the time limited by law, under rules and order of this Court, said defendant moved for a new trial, which said motion was by the Court overruled and exception thereto allowed; and likewise within said time filed his motion for arrest of judgment, and which was by the Court overruled and to which an exception was allowed; and thereafter, on the 29th day of June, 1920, said defendant was, by order and judgment and sentence of the above-entitled court, in said cause, sentenced to serve a term of three months in the King County, Washington, jail.

And your petitioner, feeling himself aggrieved by this verdict and the judgment and sentence of the Court, entered herein as aforesaid, and by the orders and rulings of this Court, and proceedings in said cause, now herewith petitions this Court for an order allowing him to prosecute a writ of error from said judgment and sentence to the Circuit Court of Appeals of the United States for the Ninth

Circuit, under the laws of the United States, and in accordance with the [12] procedure of said Court made and provided, to the end that said proceedings as herein recited, and as more fully set forth in the assignment of errors presented herein, may be reviewed and manifest error appearing upon the face of the record of said proceedings, and upon the trial of said cause, may be by the Circuit Court of Appeals corrected, and for that purpose a writ of error thereon should issue as by law and the rulings of the Court provided, and wherefore, premises considered, your petitioner prays that a writ of error issue to the end that said proceedings of the District Court of the United States for the Western District of Washington, may be reviewed and corrected, said errors in said record being herewith assigned and presented herewith, and that pending the final termination of said writ of error by said Appellate Court, an order may be entered herein that all further proceedings be suspended and stayed, and that pending such final determination, said defendant be admitted to bail.

JOHN F. DORE,

Attorney for Petitioner J. A. Russell,

Plaintiff in Error.

Acceptance of service of within petition for writ of error acknowledged this 7th day of July, 1920.

ROBT. C. SAUNDERS,

Attorney for Plaintiff.

By E. D. DUTTON.

[Indorsed]: Petition for Writ of Error. Filed in the United States District Court, Western District

of Washington, Northern Division. July 7, 1920.
F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [13]

United States District Court, Western District of
Washington, Northern Division.

No. 5260.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. A. RUSSELL,

Defendant.

Assignment of Errors.

COMES NOW the above-named defendant, J. A. Russell, and in connection with his petition for writ of error in this case submitted and filed herewith, assign the following errors which the defendant avers and says occurred in the proceedings and at the trial in the above-entitled cause, and in the above-entitled court, and upon which he relies to reverse, set aside and correct the judgment and sentence entered herein, and says that there is manifest error appearing upon the face of the record, and in the proceedings, in this:

1. The defendant, at the close of the Government's evidence, moved the Court to direct the jury to return a verdict of not guilty, which motion was denied by the Court, and to which ruling the defendant then and there excepted, for the reason and upon the ground that no crime, misdemeanor

or offense, under the laws or statutes of the United States had been proven against the defendant, and because the offense charged in the indictment had not been proven; which exception was by the Court allowed; and now the defendant assigns as error the ruling of the Court upon the said motion.

2. The defendant again, at the close of all the evidence in the case, moved the Court to direct the jury to return a verdict of not guilty, which motion was denied by the Court, and to which ruling the defendant [14] then and there excepted, for the reason and upon the ground that no crime, misdemeanor or offense, under the law or statutes of the United States had been proven against the defendant, and because the offense charged in the indictment had not been proven, which exception was by the Court allowed; and now the defendant assigns as error the ruling of the Court upon the said motion.

3. Thereafter, and within the time limited by law, and the orders and rules of the Court, the defendant moved the Court for an order setting aside the verdict of the jury and granting to him a new trial, which motion was denied by the Court, to which ruling of the Court the defendant then and there duly excepted, and the exception was by the Court allowed; and now the defendant assigns as error the ruling of the Court upon the said motion.

4. The Court thereafter entered judgment and sentence against said defendant upon the verdict of guilty rendered upon the said indictment, Count One thereof, to which ruling and judgment and sen-

tence the defendant excepted, which exception was by the Court allowed; and now the defendant assigns as error that the Court so entered judgment and sentence upon said verdict.

And as to each and every assignment of error, as aforesaid, the defendant says that at the time of making of the order or ruling of the Court complained of, the defendant duly asked and was allowed an exception to the ruling and order of the Court.

JOHN F. DORE,

Attorney for Defendant.

Acceptance of service of within Assignment of Errors acknowledged this 7th day of July, 1920.

ROBT. C. SAUNDERS,

Attorney for Plaintiff.

By E. D. DUTTON.

[Endorsed]: Assignment of Errors. Filed in the United States District Court, Western District of Washington, Northern Division. July 7, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.
[15]

United States District Court, Western District of
Washington, Northern Division.

No. 5260.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. A. RUSSELL,

Defendant.

Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond.

A writ of error is granted herein this 7th day of July, 1920, and it is further

ORDERED, that said defendant J. A. Russell be admitted to bail, and that the amount of a supersedeas bond to be filed by said defendant be fixed in the sum of \$2,000.00; and it is further

ORDERED, that upon said defendant J. A. Russell filing his bond in the aforesaid sum in due form, to be approved by the clerk of this Court, he shall be released from custody pending the determination of the writ of error herein assigned.

Done in open court, this 7th day of July, 1920.

EDWARD E. CUSHMAN,

Judge.

Acceptance of service of within order allowing writ acknowledged this 7th day of July, 1920.

ROBT. C. SAUNDERS,

Attorney for Plaintiff.

By E. D. DUTTON.

[Endorsed]: Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond. Filed in the United States District Court, Western District of Washington, Northern Division. July 7, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.
[16]

United States District Court, Western District of
Washington, Northern Division.

No. 5260.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. A. RUSSELL,

Defendant.

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we, J. A. Russell, as principal, and William Halloran and E. Zuleika Halloran, husband and wife, and Harry Cannon and Ruby Cannon, husband and wife, all of Seattle, King County, Washington, as sureties, are held and firmly bound unto the United States of America, plaintiff in the above-entitled action, in the penal sum of Two Thousand Dollars (\$2,000.00), lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such, that whereas the above-named defendant, J. A. Russell, was on the 7th day of July, 1920, sentenced in the above-entitled cause to serve a period of three months' imprisonment in the county jail of King County, Washington;

And, whereas, the said defendant has sued out a writ of error from the sentence and judgment in

said cause to the Circuit Court of Appeals of the United States for the Ninth Circuit;

And, whereas, the above-entitled court has fixed the defendant's bond, to stay execution of the judgment in said cause, in the sum of Two Thousand Dollars (\$2,000);

Now, therefore, if the said defendant, J. A. Russell, shall [17] diligently prosecute his said writ of error to effect, and shall obey and abide by and render himself amenable to all orders which said Appellate Court shall make, or order to be made, in the premises, and shall render himself amenable to and obey all process issued, or ordered to be issued, by said Appellate Court herein, and shall perform any judgment made or entered herein by said Appellate Court, including the payment of any judgment on appeal, and shall not leave the jurisdiction of this court without leave being first had, and shall obey and abide by and render himself amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, Northern Division, and will render himself amenable to and obey any and all orders issued herein by said District Court, and shall pursuant to any order issued by said District Court surrender himself and obey and perform any judgment entered herein by the said Circuit Court of Appeals or the said District Court, then this obligation to be void; otherwise to remain in full force and effect.

Sealed with our seals and dated this 8th day of July, 1920.

J. A. RUSSELL. (Seal)
 WM. HALLORAN. (Seal)
 E. ZULEIKA HALLORAN. (Seal)
 HARRY CANNON. (Seal)
 RUBY CANNON. (Seal)
 W. H. TUCKER. [18]

LIST OF REAL ESTATE.

Lots	5 & 6,	Blk. 24,	Madison St.	Add.	\$ 4,500.00	Free	and	above.
"	6,	"	2,	Burgert's	" 1,500.00	"	"	"
"	8, 9 & 10,	"	87,	Collins'	" 5,000.00	"	"	"
"	7 & 8,	"	400,	Seattle Tide Lands	7,500.00	Assets	\$1,500.00	
"	1 to 4,	"	7,	Seashore Park	3,000.00	f. & c.		
5 Acres	Vashon Island	(Pt. Lot 2,	Sec.					
29-26-3 E.)					2,000.00	f. & c.		
					<hr/>			
					\$23,500.00			

United States of America,
 State of Washington,
 County of King,—ss.

William Halloran and E. Zuleika Halloran, husband and wife, and Harry Cannon and Ruby Cannon, his wife, and W. H. Tucker, a widower, being first duly sworn, each for himself and herself and not for the other, on oath, says:

I am a resident of the State of Washington, over the age of twenty-one years, and not an attorney or counselor at law, sheriff, clerk of the Superior Court or other office of such court, or of any court; that I am worth, over and above all debts and liabilities, and exclusive of property exempt from execution, in real estate situate within King County, State of Washington, as follows: William Halloran

and E. Zuleika Halloran, husband and wife,
\$4,000.00, and Harry Cannon and Ruby Cannon,
\$4,000.00, and W. H. Tucker, a widower, \$4,000.00.

WM. HALLORAN.

E. ZULIKA HALLORAN.

HARRY CANNON.

RUBY CANNON.

W. H. TUCKER.

O. K.—N. W.

O. K.—ROBT. C. SAUNDERS,

U. S. Dist. Atty.

Subscribed and sworn to before me this 8th day
of July, 1920.

[Seal]

I. H. WARREN,

Notary Public in and for the State of Washington,
Residing at Seattle.

Approved July 8th, 1920.

EDWARD E. CUSHMAN,

Judge. [19]

[Endorsed]: Supersedeas Bond. Filed in the
United States District Court, Western District of
Washington, Northern Division. July 8, 1920. F.
M. Harshberger, Clerk. By S. E. Leitch, Deputy.
[20]

United States District Court, Western District of
Washington, Northern Division.

No. 5260.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. A. RUSSELL,

Defendant.

**Order Extending Time to and Including July 31,
1920, to File Bill of Exceptions.**

For good cause now shown, it is

ORDERED that the time within which the defendant shall serve and file his proposed bill of exceptions in the above-entitled cause be and the same hereby is extended to and including the 31st day of July, 1920.

FRANK H. RUDKIN,

United States District Judge.

O. K.—F. R. CONWAY,

Assistant U. S. Attorney.

[Endorsed]: Order Extending Time to File Bill of Exceptions. Filed in the United States District Court, Western District of Washington, Northern Division. July 17, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [21]

United States District Court, Western District of
Washington, Northern Division.

No. 5260.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. A. RUSSELL,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that on the 22d day of June, 1920, at the hour of ten o'clock, A. M., the above-entitled cause came regularly on for trial in the above-entitled court, before the Honorable Edward E. Cushman, Judge thereof, the plaintiff appearing by F. R. Conway, Assistant United States Attorney for said District, and the defendant, J. A. Russell, being present in court, and represented by his counsel, John F. Dore and J. L. Finch.

Whereupon the following proceedings were had:

Mr. CONWAY.—If your Honor please, there are two counts in this indictment. At this time the Government elects to proceed on the first count only on this trial.

The COURT.—Do you move a dismissal of the other?

Mr. CONWAY.—No, your Honor.

Mr. FINCH.—At this time, your Honor, the defendant asks for a dismissal of the second count in this indictment, the Government having elected to

proceed under the first, and I also ask it for the reason that there is no crime charged in it.

The COURT.—Do you resist it?

Mr. CONWAY.—Yes, your Honor, I do resist it. I don't have to go to trial on both counts in this indictment unless I want to.

The COURT.—Is the defendant on bail?

Mr. FINCH.—Yes, your Honor.

The COURT.—Motion denied. [22]

Mr. FINCH.—Note an exception.

The COURT.—Exception allowed.

Thereafter a jury was regularly and duly impanelled and sworn to try said cause, and the United States Attorney having made his opening statement, the following proceedings were had:

Testimony of Julius Taylor, for the Government.

JULIUS TAYLOR, produced as a witness on behalf of the *the* Government, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. CONWAY.)

My name is Julius Taylor. On the 13th of last January I was living at the Normandie Apartments in the city of Seattle. Henry V. Hanson was living with me. I think I saw the defendant there at that time. Hanson was at home at the same time. The defendant came there about 7:45 in the evening of Tuesday, January 13, 1920. I was doing some lodge work that I had to perform on account of having a meeting on the following evening, and I answered the door, and on opening the door there were two gentle-

(Testimony of Julius Taylor.)

men on the outside. One of them looked in and says: "Well, you have company." I says, "No, not much." They stepped back, and the defendant pulled his coat back; that was all I wanted to see. He had a star on, and he says: "We are from the Federal Government." That is the man who pulled back his coat. (Pointing to defendant.)

Q. Examine that badge. I will ask the clerk to identify that as Government's Exhibit 1, and testify whether you recognize it.

A. I can't say that I do, because I didn't pay much attention to it. I didn't examine the badge particularly. It was fastened on defendant's vest under his coat. The defendant [23] came in and he says, "I understand that you have ten cases of liquor." I says, "If I have, you may go and examine it and I will help you look for it." I says, "Go inside and look around and see if you can find it, and I will help you look for it." He came in; Mr. Hanson was in the other part of the apartment. I took the defendant and the other man into our dining-room. There the defendant asked if I had any liquor. I said, "I don't think I have to answer that question." The defendant said to his companion, "You search this place and I will search the other place." I told him we had no liquor in the apartment. He says, "You have some place that you store your stuff." I says, "Yes, we have a storeroom downstairs on the second floor."

The defendant left the other man with me and went to the part of the apartment where Hanson

(Testimony of Julius Taylor.)

was, and that is all I saw of him until he came back later. While he was gone the other man and I got kind of chummy, seeing that he had an Elk pin on, I thought he was a pretty good Bill and I says: "Where do you belong, Bill?" He said, "I belong to 92." I pulled out my card, thinking he would do likewise, but he didn't. We got to talking and I says, "What is it going to cost me to get out of this?" He says: "Don't do anything that is going to hurt yourself, because the party I am with is a pretty good fellow, and I think we can get along,"—as much as to intimate that a little bit of change might fix up matters, so when the defendant came back after making the search and says, "Let's go," I says, "All right." I says, "I would like to stave this off until Thursday morning, because on Wednesday night I have a very important lodge meeting, the installation of officers at the lodge," and I told about being an officer and having to be there, and says, "If you boys hold this off until Thursday morning, I will go down with you." [24] We got to talking back and forth and finally I pulled out my pocketbook and I opened it something on this order (indicating it), and I put my hand inside, and I threw a little piece of change on the table. I says: "If this is going to do you boys any good, we will call this thing square." One of them said, "Will the people in the other part of the house know anything about this?" and I says, "No." I believe it was the other man who said that; I won't be sure. All I was thinking about was this: Wednesday night

(Testimony of Julius Taylor.)

was lodge night, and I didn't want to miss it. They bid me goodnight and beat it, picking up the money. That gentleman (pointing to defendant) picked the money up. It was \$80.00. I threw out \$95.00 first, but pulled \$15.00 back. The money was United States currency.

Cross-examination.

(By Mr. FINCH.)

I run a tailor-shop in the Hoge Building. I never saw either of the two men before. I did not say in my direct examination that I thought I saw the defendant at my apartment.

Mr. FINCH.—Mr. Stenographer, will you turn back to that testimony?

(Stenographer reads former testimony.)

“This is the first time I have seen the defendant since that night, but I believe, I am sure, that he is the same man; he had an overcoat on at the time. I have never seen the other man since that night, and don't know him or where he is.”

Q. Now, what was said or done at the door?

A. They opened the door, and the shorter one of the two looked inside and saw Mr. Hanson there and says: “You have company,” and with that he walked back a piece and he pulled his coat back and said, “We are from the Federal Government.” The defendant is the man who said that. [25]

Q. Those were his words, “We are from the Federal Government?” A. Yes.

When inside, the men only talked about liquor;

neither of them asked for any money. Nothing was said about money at the door. The man designated as "Bill" is the man that I talked with about money. It was getting along about eight-thirty or half to nine, and I said: "If it is going to cost me any money and I have to get a pile, I want to know how much I should get, because I have some pretty good friends in this town, and I thought it would be pretty late to get them after nine o'clock. He said, "Don't do anything that you should not do, because the man I am with is a pretty good sort of a fellow, and I think we can fix matters up without going to that bother."

That left an opening for me to know just about what he meant. The defendant was not present when the talk about the money occurred. I did not take advantage of the opening on the spot, but waited until the defendant returned. When the defendant came back, he did not say anything about money, but pretty soon I pulled some money out of my pocket and threw it down on the table. I did that absolutely of my own motion, and in doing so I said that there was a piece of change if it would do any good, and the men picked the money up and went away. [26]

Testimony of Henry V. Hanson, for the Government.

HENRY V. HANSON, produced as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. CONWAY.)

I was living at the Normandie Apartments on the 13th of last January. Mr. Taylor occupied the apartment with me. I saw the defendant there at that time. Mr. Taylor and I were in the room when the door-bell rang. Taylor answered the bell. A few minutes later they came in and went into the other room. A few minutes later the defendant came into the room that I was sitting in and pulled back his coat and says, "I am a Federal man." He searched the room and went out into the other room. Then the phone rang and I answered the phone. Then I heard him say to Taylor, "Where is your liquor?" Taylor says, "We have no liquor." Then he said, "We have a baggage-room," and defendant says, "I want to go down there." I took the defendant to the baggage-room. He found the trunks that belonged to our apartments, opened them, looked in them, and finally we came back to the apartment. He went into the room where Taylor was, and I went into the other room, and that is all there was to it. I did not go into the room where Taylor and the defendant was, and did not see the defendant any more. I did not see the other man at all. I saw the defendant afterwards on the

(Testimony of Henry V. Hanson.)

street. He was pointed out to me. I stood in front of the Mecca one day, and the fellow I was talking with said the defendant was in the Meadowdale affair. And I said, "He is the same fellow that visited us." Then I had a talk with him the other day. There wasn't much said, but he said he guessed he was up against it, and walked away up the street. I don't remember who spoke first. I was going up Union Street and he was coming down. I believe he called to me, if I remember, tapped me on the shoulder. I really don't remember what I said to him. He said he was up against it, and I passed some word off to him. I don't remember what I said to him. It was only a minute in passing by, and I went up the street. There was nothing said about the trial of this case, or about my testifying against him, or being easy on him—not a thing. [27]

Cross-examination.

(By Mr. FINCH.)

It was about a month after the occurrence at the apartment that the defendant was pointed out to me on the street. I did not talk with him at that time. Up here at the Federal building I was asked to identify that badge. Mr. Saunders asked me to identify it.

Q. Didn't they offer you Russell's badge, and ask you if you could identify it as the badge that the man who had called out there at the house?"

A. "I believe they did."

Testimony of C. C. Klingel, for the Government.

C. C. KLINGEL, produced as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. CONWAY.)

I can identify Government's Exhibit 1. I first saw it at Meadowdale, Washington, on the 22d day of March of this year. It was in possession of Prohibition Agent William C. Vest. He had taken it away from Mr. Russell. Mr. Vest handed me the badge, and in the presence of Mr. Russell told me that Mr. Russell had stuck it out to him at the time he was arrested, and had said, "See, see, Government Revenue Inspector, United States Navy Department." Russell did not deny it.

By Mr. CONWAY.—"I offer in evidence Government's Identification '1.' "

The COURT.—"It may be admitted."

Cross-examination.

(By Mr. FINCH.) [28]

I did not hear Russell say, "See, see," etc. Mr. Vest told me that is what Russell said.

Redirect Examination.

(By Mr. CONWAY.)

Q. "Captain Klingel, can you testify as to whether on the 13th of January last, the defendant was in the employ of the Federal Government?"

A. "Only what he told me himself. He told me

(Testimony of C. C. Klingel.)

he was employed as Inspector over at the Navy Yard."

I was the Federal Prohibition Agent in charge for the State of Washington. I was familiar with the Federal employees connected with the enforcement of the liquor laws. The defendant was not such an employee.

Whereupon the Government rested.

Whereupon the defendant challenged the sufficiency of the Government's evidence, and moved the Court to instruct the jury to return a verdict of not guilty, for the reason and upon the ground that the offense charged in the indictment had not been proven, and no sufficient evidence thereof had been introduced to warrant giving the case to the jury. This motion was denied. Whereupon the defendant duly excepted to the ruling of the Court, and his exception was by the Court allowed.

Thereupon, the defendant's opening statement to the jury having been made by his counsel, the following testimony was introduced on behalf of the defense:

Testimony of James A. Russell, in His Own Behalf.

JAMES A. RUSSELL, the defendant, produced as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FINCH.)

I am the defendant. I heard the testimony of the witnesses Taylor and Hanson. I was not at their apartment on the 13th of January last. I know

(Testimony of James A. Russell.)

nothing of the occurrence they testified about. I did not get \$80.00 [29] or any other sum from Mr. Taylor. I did not represent to him, or to Mr. Hanson, that I was a Government officer of any character. I recognize the badge shown me, Government's Exhibit 1. It is a construction and repair department badge of the United States Navy, and is issued to all timber inspectors as recognition in visiting from mill to mill, and I act in that capacity when they need an extra timber inspector, and that is a badge I have worn for the past three years. I have been in the employ of the Government continuously for the past four years, and am so employed at the present moment, and that is my badge of authority, issued by the Government and the Government knows I have it. I parted with it on the morning of the 21st or 22d of March of this year, at Meadowdale, Washington. We were driving from Meadowdale to Seattle with some liquor in our machine when Mr. Vest and some revenue officers stopped us and told us to hold up our hands and get out of the machine, which I did. I said to Mr. Vest, "Who are you, and where is your authority?" He said, "You keep your hands in the air, or I will shoot." I said, "There is no use of that talk; all we want to know is to see your identity, who you are." And I put my hand in here and unloosened the badge, and I says, "I work for the Government, and they furnish me with a badge, and if you do you will have one, too." He took my badge, looked at it, and says, "That is an old badge;

(Testimony of James A. Russell.)

it is out of date." I says, "It is not." I told him it is a construction and repair department of the Navy Yard, that my name was Russell, and that I was employed at Bremerton. He put the badge in his pocket, and later I was arrested on this charge of impersonating an officer. I heard the witness Hanson testify about meeting me on the street. I think he did pass me on the street at the newsstand one day. I remember saying that I was up against it. I referred to the Meadowdale affair, and since that conversation I came into this court and pleaded guilty to my participation in that affair. That is what I referred to in saying I was up against it. [30]

Cross-examination.

(By Mr. CONWAY.)

I never became acquainted with Mr. Hanson. I never talked with him, except on the occasion at the newsstand. I never saw Mr. Taylor until today.

Thereupon the defense rested.

Thereupon the Government rested.

Thereupon the defendant renewed the motion made at the close of the Government's case, for the reasons then given, and for the further reason that the Government had offered no rebuttal. This motion was denied, to which ruling of the Court the defendant then and there excepted, and his exception was by the Court allowed.

Argument of counsel to the jury being had, the Court thereupon instructed the jury as to the law in the premises, to which no exceptions were taken.

Whereupon the jury retired to deliberate upon their verdict.

Thereafter on the same day the said jury returned into court and rendered their verdict finding the defendant guilty upon the first count of the indictment.

Thereafter the defendant duly filed his written motion now on file herein praying that the verdict of the jury be set aside and a new trial granted him. [31]

Thereafter on the 7th day of July, 1920, the said motion came duly on for hearing before the Court, and after argument of counsel the Court denied said motion, to which ruling of the Court the defendant excepted, and his exception was by the Court allowed.

Whereupon the Court did pronounce sentence upon said defendant that he be imprisoned in the county jail of King County, Washington, for the period of three months.

And, now, in furtherance of justice, and that right may be done, the said defendant, James A. Russell, tenders and presents to the Court the foregoing as his bill of exceptions in the above-entitled cause, and prays that the same may be settled and allowed and signed and sealed by the Court and made a part of the record in this case.

JOHN F. DORE,

J. L. FINCH,

Attorneys for Defendant.

Service of copy hereof hereby acknowledged this 31st day of July, 1920.

F. R. CONWAY,

Assistant United States Attorney. [32]

The defendant, J. A. Russell, having tendered and presented the foregoing as his bill of exceptions in this cause to the action of the Court, and in furtherance of justice and that right may be done him, and having prayed that the same may be settled and allowed, authenticated, signed and sealed by the Court, and made a part of the record herein, and the Court having considered said bill of exceptions, and all objections and proposed amendments made thereto by the Government, and being now fully advised, does now in furtherance of justice and that right may be done the defendant, sign, seal, settle and allow said bill of exceptions as the bill of exceptions in this cause, and does order that the same be made a part of the record herein.

The Court further certifies that each and all of the exceptions taken by the defendant, as shown in said bill of exceptions, were at the time same were taken, allowed by the Court.

The Court further certifies that said bill of exceptions contains all material matters and evidence material to each and every assignment of error made by the defendant and tendered and filed in Court in this cause with said bill of exceptions.

The Court further certifies that said bill of exceptions was filed and presented to the Court within the time provided by law, as extended by the orders of the Court heretofore made herein.

Done and ordered in open court, counsel for the Government and the defendant being now present, this 18th day of October, 1920.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Bill of Exceptions Lodged in the United States District Court, Western District of Washington, Northern Division. July 31, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

[Indorsed]: Bill of Exceptions. Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 18, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [33]

United States District Court, Western District of
Washington, Northern Division.

No. 5260.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. A. RUSSELL,
Defendant.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please make a transcript of record on appeal to the Circuit Court of Appeals of the Ninth Circuit, in the above-entitled cause, and include therein the following:

Indictment.

Arraignment.

Plea.

....

Record for trial and impanelling jury.

Verdict.

Motion for new trial.

Hearing on motion for new trial.

Judgment and sentence.

Petition for writ of error.

Assignment of error.

Order allowing writ of error.

Supersedeas.

Order extending time for filing bill of exceptions.

Bill of exceptions.

Order extending time to file record.

Order extending time to file record.

Stipulation extending time to file record.

Order settling bill of exceptions.

Writ of error.

Citation.

Defendant's praecipe.

JOHN F. DORE,

Attorney for Defendant. [34]

We waive the provisions of the Act approved February 13, 1911, and direct that you forward type-written transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this Court.

JOHN F. DORE,

J. L. FINCH,

Attorneys for Defendant.

[Indorsed]: Praeipie for Transcript of Record. Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 12, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [35]

United States District Court, Western District of
Washington, Northern Division.

No. 5260.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES A. RUSSELL,

Defendant.

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court, for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 35, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return

to said writ of error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: "[36]

Clerk's fee (Sec. 828, R. S. U. S.) for making record, certificate or return, 77 folios at 15¢.	\$11.55
Certificate of Clerk to transcript of record— 4 folios at 15¢.60
Seal to said Certificate.20
Certificate of Clerk to original exhibit.	45
Seal to said Certificate.20

I hereby certify that the above cost for preparing and certifying record amounting to \$13.00 has been paid to me by attorneys for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and original citation issued in this cause, together with original Government's Exhibit 1.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at

Seattle, in said District, this 8th day of November, 1920.

[Seal]

F. M. HARSHBERGER,
Clerk U. S. District Court. [37]

In the District Court of the United States, Western
District of Washington, Northern Division.

No. 5260.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. A. RUSSELL,

Defendant.

Writ of Error.

The United States of America,—ss.

The President of the United States of America, to the
Honorable Judges of the District Court of the
United States for the Western District of Wash-
ington, Northern Division, GREETING:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which is in
said District Court, before the Honorable Edward E.
Cushman, between J. A. Russell, the plaintiff in
error, and the United States of America, the defend-
ant in error, a manifest error hath happened to the
prejudice and great damage of J. A. Russell, plaintiff
in error, as by his complaint and petition herein
appears, and we being willing that error, if any hath
been, should be duly corrected, and full and speedy
justice done to the party aforesaid in this behalf,

DO COMMAND YOU, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, together with this writ, so that you have the same at said City of San Francisco within thirty days from the date hereof, in said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being then and there inspected, said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States of America should be done in the premises. [38]

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 7th day of July, 1920, and the year of the Independence of the United States, one hundred and forty-third.

[Seal]

F. M. HARSHBERGER,

Clerk of the District Court of the United States for the Western District of Washington, Northern Division. [39]

Acceptance of service of within writ of error, acknowledged this 7th day of July, 1920.

ROBT. C. SAUNDERS,

Attorney for Plaintiff,

By E. D. DUTTON. [40]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. July 7, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

United States District Court, Western District of
Washington, Northern Division.

No. 5260.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. A. RUSSELL,

Defendant.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States of America, to the
United States of America, and to ROBERT
C. SAUNDERS, United States Attorney for the
Western District of Washington, Northern Division,
GREETING:

You are hereby cited and admonished to be and
appear before the United States Circuit Court of
Appeals for the Ninth Circuit at San Francisco, in the
State of California, within thirty days from the date
hereof, pursuant to a writ of error filed in the clerk's
office of the District Court of the United States for
the Western District of Washington, Northern Division,
wherein J. A. Russell is plaintiff in error, and
the United States of America is defendant in error,
to show cause, if any there be, why judgment in the
said writ of error mentioned should not be corrected
and speedy justice should not be done to the party
in that behalf.

WITNESS, the Honorable EDWARD CUSHMAN, Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 7th day of July, 1920.

EDWARD E. CUSHMAN,
United States District Judge.

[Seal] Attest: F. M. HARSHBERGER, Clerk
of the District Court of the United States, for
the Western District of Washington. Northern
Division. [41]

Acceptance of service of within Citation on Writ
of Error acknowledged this 7th day of July, 1920.

ROBT. C. SAUNDERS,
Attorney for Plaintiff.

By E. D. DUTTON. [42]

[Endorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division. July 7, 1920. F. M. Harshberger, Clerk.
By S. E. Leitch, Deputy.

[Endorsed]: No. 3598. United States Circuit
Court of Appeals for the Ninth Circuit. James A.
Russell, Plaintiff in Error, vs. The United States of
America, Defendant in Error. Transcript of Rec-
ord. Upon Writ of Error to the United States Dis-
trict Court of the Western District of Washington,
Northern Division.

Filed November 12, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States District Court, Western District of
Washington, Northern Division.

No. 5260.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. A. RUSSELL,

Defendant.

**Order Extending Time to and Including November
18, 1920, to File Record and Docket Cause.**

For good cause now shown, it is

ORDERED, that the time within which defendant shall make, serve and file his record in the above-entitled cause, in the Circuit Court of Appeals, be and the same is hereby extended to and including the 18th day of November, 1920.

Done in open court this 18 day of October, 1920.

EDWARD E. CUSHMAN,
United States District Judge.

O. K.—ROBT. C. SAUNDERS,
United States Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 18, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

United States District Court, Western District of
Washington, Northern Division.

No. 5260.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. A. RUSSELL,

Defendant.

**Order Extending Time to and Including October 20,
1920, to File Record and Docket Cause.**

For good cause now shown, it is

ORDERED, that the time for filing the record in
the above-entitled cause in the office of the clerk of
the Circuit Court of Appeals be and the same hereby
is extended to October 20th, 1920.

Done in open court, this 20th day of September,
1920.

JEREMIAH NETERER,

United States District Judge.

O. K.—F. R. CONWAY,

Asst. U. S. Atty.

[Endorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division. Sep. 20, 1920. F. M. Harshberger, Clerk.
By S. E. Leitch, Deputy.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 5260.

J. A. RUSSELL,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

**Order Extending Time Sixty Days from August 6,
1920, to File Record and Docket Cause.**

For good cause shown, it is

ORDERED that the time for filing the record in the above-entitled cause in the office of the clerk of the above-entitled court be and the same is hereby extended for sixty (60) days from the 6th day of August, 1920.

Done in the open court, this 4th day of August, 1920.

JEREMIAH NETERER,

United States District Judge.

O. K.—F. R. CONWAY,

Asst. United States District Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 4, 1920. F. M. Harshberger, Clerk. By ———, Deputy.

No. 3598. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16, Enlarging Time to and Including ———, 1920, to File Record and Docket Cause. Filed Nov. 12, 1920. F. D. Monekton, Clerk.

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES A. RUSSELL,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Plaintiff in Error

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
WESTERN DISTRICT OF WASH-
INGTON, NORTHERN
DIVISION.

JOHN F. DORE, of Seattle, Wash.,

J. L. FINCH, of Seattle, Wash.,

Attorneys for Plaintiff in Error.

FILED

FEB 10 1921

U. S. DISTRICT COURT.

United States Circuit Court of Appeals

For the Ninth Judicial Circuit

No. 3598.

JAMES A. RUSSELL,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

JOHN F. DORE, of Seattle, Wash.,

J. L. FINCH, of Seattle, Wash.,

Attorneys for Plaintiff in Error.

STATEMENT OF THE CASE.

Writ of Error to the United States District Court of the State of Washington, Northern Division, upon conviction upon the first of two counts of an indictment. The count in question charged that plaintiff in error, with intent to defraud one Julius Taylor, "did then and there falsely assume and pretend to be an officer and employee acting under the authority of the United States, to-wit, a revenue officer and employee, and in such pretended character" did fraudulently demand and obtain from said Taylor the sum of \$80.00, contrary to the statute, etc. (Tr. pp. 1 and 2). The statute involved is section 5438 Revised Statutes, as amended, being section 10196 of the Compiled Statutes, commonly known as the "false personation" statute.

The evidence of the government was furnished in the main by two witnesses, one Julius Taylor, and one Henry V. Hansen. Taylor testified that plaintiff in error, with an unknown companion, visited his apartment and throwing back his coat and showing a badge announced, "We are from the Federal government." He then broached the subject of intoxicating liquor, and being invited to make a search of the premises, left the room, leaving the witness and the unidentified man together.

The evidence does not disclose what, if any thing was found, but while plaintiff in error was gone the witness, after a conversation with the stranger, concluded to offer plaintiff in error a bribe. When the latter returned the witness tossed \$80.00 upon a table with the remark, "If this will do you boys any good, we will call this thing square." And the witness said that plaintiff in error picked up the money, and the two made off. (Tr. pp. 23, 24, 25, 26 and 27).

Hansen testified that the announcement of plaintiff in error was, "I am a Federal man." (Tr. p. 28).

The government then introduced, as the badge exhibited by plaintiff in error to the witnesses Taylor and Hansen, a badge that government officials had taken off plaintiff in error upon another occasion. (Tr. p. 30; and see original exhibit, Gov't's. Exhibit 1).

It was conceded by the government that the plaintiff in error was an employee of the United States government, being stationed at Bremerton, Washington, and working in the construction and repair department of the navy yard located at that point. It was also conceded that he has been so employed for the past four years, and was such employee even

upon the day of trial. It is also conceded that, as such employee, the government had issued to him a badge of identity and authority, which badge he has worn constantly for the past three years, or until March 22, 1920. Upon the latter date he engaged in a contraband liquor episode at Meadowdale, Washington, when and where he was arrested and his badge taken off him by Federal Prohibition officers. (Tr. pp. 31-32 and 33). This is the badge the government offered in evidence as the badge worn by plaintiff in error and exhibited by him to Taylor and Hansen. (Tr. p. 30). Plaintiff in error denied any and all knowledge of the alleged transaction. (Tr. pp. 31 and 32), but the jury having resolved the question against him, he is foreclosed on that point here.

At the close of the Government's case, plaintiff in error moved the court for a directed verdict, which was denied, and an exception allowed. (Tr. p. 31). And at the end of the trial he renewed the motion, which was again denied, and an exception again allowed. (Tr. p. 33). This action of the court was assigned as error, (Tr. p. 13, assignment Nos 1 and 2), and is the only error to be pressed here.

ARGUMENT.

Plaintiff in error contends:

(1) *That there was a fatal variance between the charge contained in the indictment and the proof introduced by the government;*

(2) *That, even if plaintiff in error did make the representations testified to, he but spoke the truth, and hence was guilty of no "false personation";*

(3) *That, if he did obtain the \$80.00, he obtained it in no "pretended character."*

(1) *That there was a fatal variance between the charge contained in the indictment and the proof introduced by the government.*

The indictment charges plaintiff in error "did then and there falsely assume and pretend to be an officer and employee acting under the authority of the United States, to-wit, a revenue officer and employee." The evidence offered by the government in support of the charge was given by two witnesses, Taylor and Hansen. Taylor testified that plaintiff in error said, "We are from the Federal government." Hansen testified the remark was, "I am a Federal man." Neither supported the charge. Taylor's version indicates plaintiff in error stated the *place whence* he came. "I am from the Federal government" does not carry with it any representation that the speaker is an officer of such government. He might be but an employee.

he might be but a messenger, and he might be lying outright. But by no construction can it be made to mean "I am a revenue officer."

Hansen's version, "I am a Federal man," comes nearer the mark, in comparison with Taylor's but it, too, falls far short of requirements. A "Federal man" is probably "an officer or employee" of the government. But if it was necessary for the pleader to specify in the indictment the *kind* of an officer appellant represented himself to be, (as it was, and as he did), it was equally necessary for the proofs to show the same thing.

A postmaster, as well as the Secretary of State, is a "Federal man." But neither one is a "revenue officer." The pleader, having in mind the circumstances of the transaction, evidently thought the appropriate words should have been, "I am a revenue officer," and he accordingly put those words into the mouth of plaintiff in error. But he received no support from his witnesses. The variance is fatal. Having stated the kind of an officer the accused represented himself to be, the government must prove it as alleged.

State v. Phillips, 27 Wash. 364.

Allen v. State, 8 Tex. App. 360.

Marshal v. State, 7 Am. 415, 75 S. W. 584.

Hamilton v. State, 60 Ind. 193, 28 Am. Rep. 653.

(2) *That, even if plaintiff in error did make the representations testified to, he but spoke the truth, and was guilty of no "false personation."*

Regardless of any particular shade of meaning in the remarks, "I am from the Federal government," or, "I am a Federal man," there was no false personation; for, in connection with plaintiff in error's remark, whatever it was, both witnesses testified he threw back his coat and exhibited a badge; and the government then introduced in evidence plaintiff in error's badge issued to him by the government, as the badge he exhibited upon that occasion.

Wherein, then, did plaintiff in error violate the "false personation" statute? He was, indeed, "from the Federal government." He was, also, "a Federal man." Neither statement was false. His mission was not creditable, to be sure; but he spoke no falsehood. Suppose, the United States Marshal were to meet a man in a dark alley and, drawing his weapon and exhibiting his star, were to say to the wayfarer, "I am a United States Marshal. How much money have you on your person?" He would be guilty of a crime, and should be in the penitentiary. But not because he had *falsely pretended*

to be a United States Marshal! To invoke the false personation statute to fit such circumstances would be the height of absurdity. But no less absurd is the case at bar.

The government itself introduced the badge. It was a genuine badge, and made absolutely good the verbal representations imputed to plaintiff in error. Wherein, then, did plaintiff in error falsely "assume" or "pretend" anything? And why should the case not have been taken from the jury?

(3) *That if he did obtain the \$80.00, he obtained it in no "pretended character."*

The remarks made under (2) above apply again. *Taylor's 8000, but he did not do so*
 Plaintiff in error may have "obtained" in any "pretended character." If the facts be as alleged, no doubt a state statute could be found to fit the circumstances. But the Federal personation statute, upon which this indictment was predicated, has no pertinancy.

Respectfully submitted,

JOHN F. DORE, of Seattle, Wash.

J. L. FINCH, of Seattle, Wash.

Attorneys for Plaintiff in Error.

//

United States

Circuit Court of Appeals

For the Ninth Circuit.

AETNA INSURANCE COMPANY, a Corporation,
UNION MARINE INSURANCE
COMPANY, a Corporation, and HART-
FORD FIRE INSURANCE COMPANY, a
Corporation,

Plaintiffs in Error,

vs.

SACRAMENTO-STOCKTON STEAMSHIP
COMPANY, a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
Second Division.

FILED

DEC 3 - 1920

F. D. MONGATON

United States
Circuit Court of Appeals
For the Ninth Circuit.

AETNA INSURANCE COMPANY, a Corporation,
UNION MARINE INSURANCE
COMPANY, a Corporation, and HART-
FORD FIRE INSURANCE COMPANY, a
Corporation,

Plaintiffs in Error,

vs.

SACRAMENTO-STOCKTON STEAMSHIP
COMPANY, a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
Second Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States in and
for the Northern District of California, Second
Division.

THE SACRAMENTO STOCKTON STEAMSHIP
COMPANY, a Corporation,

Plaintiff,

vs.

THE AETNA INSURANCE COMPANY, a Cor-
poration, THE UNION MARINE INSUR-
ANCE COMPANY, LIMITED, a Corpora-
tion, THE HARTFORD FIRE INSUR-
ANCE COMPANY, a Corporation,

Defendants.

Complaint.

The above-named plaintiff, complaining of the
above-named defendants, for cause of action alleges
as follows:

I.

That at all the times hereinafter mentioned the
plaintiff, Sacramento Stockton Steamship Company,
was, and still is, a corporation organized under the
laws of the State of California, with its principal
place of business in the City and County of San
Francisco in said State, and at all of said times was,
and still is, a citizen of said State of California.

II.

That at all the times hereinafter mentioned the
Aetna Insurance Company was, and still is, a corpo-
ration duly organized under the laws of the State of
Connecticut, with its principal place of business at
Hartford in said State of Connecticut, and at all of

said times was and still is a citizen of the said State of Connecticut.

III.

That at all times hereinafter mentioned The Union Marine Insurance Company, Limited, was and still is, a corporation [1*] organized under the laws of the United Kingdom of Great Britain and Ireland, with its principal place of business at Liverpool, and at all of said times was, and still is, a citizen and subject of said United Kingdom of Great Britain and Ireland.

IV.

That at all the times hereinafter mentioned the Hartford Fire Insurance Company was, and still is, a corporation organized and existing under the laws of the State of Connecticut, with its principal place of business at Hartford in said State, and at all of said times it was, and still is, a citizen of said State of Connecticut.

V.

That at all the times herein mentioned the said Sacramento Stockton Steamship Company was the owner of the steamer hereinafter referred to and called the "Monarch," together with her body, tackle, apparel, boats and other furniture.

VI.

That heretofore, to wit, on the 22d day of July, 1914, the said Aetna Insurance Company made, executed, and delivered to the said Sacramento Stockton Steamship Company its certain policy of insur-

*Page-number appearing at foot of page of original certified Transcript of Record.

ance wherein and whereby the said Aetna Insurance Company agreed to, and then and there did, insure the said Sacramento Stockton Steamship Company for the sum of Ten Thousand (\$10,000.00) Dollars, upon the body, tackle, apparel, ordinance, munitions, artillery, boat and other furniture of and in the said steamer called the "Monarch," from July 22d, 1914, at noon, Pacific Standard Time, to July 22, 1915, at noon, Pacific Standard time, against the perils in said policy enumerated, a copy of which policy is hereto attached, marked Exhibit "A" and hereby specially referred to and made a part of this complaint.

VII.

That heretofore, to wit, on the 25th day of July, 1914, the said The Union Marine Insurance Company, Limited, made, executed and delivered to the said Sacramento Stockton Steamship Company, [2] its certain policy of insurance wherein and whereby the said The Union Marine Insurance Company, Limited, agreed to and then and there did, insure the said Sacramento Stockton Steamship Company for the sum of Three Thousand Seven Hundred and Fifty (\$3,750.00) Dollars, upon the body, tackle, apparel, ordinance, munitions, artillery, boat and other furniture in the said steamer called the "Monarch," from July 22d, 1914, noon, Pacific Standard time, to July 22d, 1915, noon, Pacific Standard Time, against the perils in said policy enumerated, a copy of which said policy is hereto attached, marked Exhibit "B," and hereby specially referred to and made a part of this complaint.

VIII.

That heretofore, to wit, on the 22d of July, 1914, the said Hartford Fire Insurance Company made, executed and delivered to the said Sacramento Stockton Steamship Company its certain policy of insurance wherein and whereby the said Hartford Fire Insurance Company agreed to and then and there did, insure the said Sacramento Stockton Steamship Company for the sum of Six Thousand (\$6,000.00) Dollars, upon the body, tackle, apparel, ordinance, munitions, artillery, boat and other furniture on and in the said steamer called the "Monarch," at and from July 22d, 1914, noon, Pacific Standard time, to July 22d, 1915, noon, Pacific Standard time, against the perils in said policy enumerated, a copy of which said policy is hereto attached, marked Exhibit "C," and hereby specially referred to and made a part of this complaint.

IX.

That thereafter, to wit, on or about the 15th day of April, 1915, the said steamer "Monarch" was wrecked and totally lost by perils in said policies named, and thereby insured against.

X.

That thereafter on the 3d day of June, 1915, the said Sacramento Stockton Steamship Company served Notice of Abandonment upon said Aetna Insurance Company, which said Notice of Abandonment [3] was in words and figures following, to wit:

"To Aetna Insurance Company of Hartford, Connecticut, and to E. J. Livingston, its Agent:

Please take notice: That the Steamer 'Monarch,' her body, tackle, apparel, machinery, boilers, boats, and furniture insured with you for the sum of Ten Thousand (\$10,000.00) Dollars under your policy No. 3563, in favor of Sacramento Stockton Steamship Company, has been heretofore, to wit: On or about the 15th day of April, 1915, wrecked and lost by perils insured against in your said policy, and the said Sacramento Stockton Steamship Company hereby abandons to you, as insurers on the said vessel, all its right, title and interest in and to the said Steamer 'Monarch,' her body, tackle, apparel, machinery, boilers, boats and furniture in the proportion that the sum insured therein bears to the valuation in the said policy, and hereby gives you notice that the said insured intends to claim from you the whole sum insured under said policy as and for a total loss.

Dated, San Francisco, California, June 3d, 1915.

SACRAMENTO STOCKTON STEAMSHIP
COMPANY,

By GEORGE G. GORMLEY,
President.

W. W. COPE,
Secretary."

XI.

That in reply to said Notice of Abandonment the said Aetna Insurance Company did, on the 8th day of June, 1915, serve upon said Sacramento Stockton Steamship Company its refusal to accept said aban-

donment, and assigned its reason therefor in words and figures following:

“San Francisco, Cal.,

June 8, 1915.

Sacramento—Stockton Steamship Co.,

Pier No. 3,

San Francisco, Cal.

Dear Sirs:

Policy No. 3563—Steamship ‘Monarch.’

We beg to notify you that we refuse to accept the abandonment of your interest in the steamer ‘Monarch’ said to have been wrecked and lost on or about the 15th day of April, 1915.

Our policy No. 3563 was rescinded and voided by the unseaworthiness of said vessel which caused her loss.

Yours very truly,

E. J. LIVINGSTON,

Asst. General Agent.”

XII.

That thereafter, to wit, on the 3d day of June, 1915, the [4] *the* said Sacramento Stockton Steamship Company served Notice of Abandonment upon the said The Union Marine Insurance Company, Limited, which said Notice of Abandonment was in words and figures following, to wit:

“To The Union Marine Insurance Company, Limited, of Liverpool, and to W. Irving, Esq., its Pacific Coast Branch Manager:

Please take notice: That the steamer ‘Monarch,’ her body, tackle, apparel, machinery, boilers, boats and furniture, insured with you for the sum of Three

Thousand Seven Hundred and Fifty (\$3,750.00) Dollars, under your Policy No. 709, in favor of the Sacramento Stockton Steamship Company, has been heretofore, to wit, on or about the 15th day of April, 1915, wrecked and lost by perils insured against in your said policy, and the said Sacramento-Stockton Steamship Company hereby abandons to you as insurers on the said vessel, all its right, title and interest in and to said steamer 'Monarch,' her body, tackle, apparel, machinery, boilers, boats and furniture, in the proportion that the sum insured therein bears to the valuation in the said policy, and hereby gives you notice that the said insured intends to claim from you the whole sum insured under your said policy as and for a total loss.

Dated, San Francisco, California, June 3d, 1915.

SACRAMENTO STOCKTON STEAM-
SHIP COMPANY,

By GEORGE G. GORMLEY,

President.

W. W. COPE,

Secretary."

XIII.

That in reply to said Notice of Abandonment the said The Union Marine Insurance Company, Limited, did, on the 5th day of June, 1915, serve upon said Sacramento Stockton Steamship Company its refusal to accept said abandonment, and assigned its reason therefor in words and figures following:

“San Francisco, Cal.,

June 5/15.

Sacramento Stockton Steamship Co.,
San Francisco, Calif.

Dear Sirs: We beg to notify you that we refuse to accept the abandonment of your interest in the steamer ‘Monarch’ said to have been wrecked and lost on or about the 15th day of April, 1915.

Our policy No. 709 was rescinded and voided by the unseaworthiness of said vessel which caused her loss.

Respectfully yours,

WM. HENDERSON,

Underwriter.” [5]

XIV.

That thereafter, to wit, on the 3d day of June, 1915, the said Sacramento Stockton Steamship Company served notice of abandonment upon said Hartford Fire Insurance Company, which said Notice of Abandonment was in words and figures following, to wit:

“To the Hartford Fire Insurance Company, Hartford, Connecticut, and to Dixwell Hewitt, Its General Agent:

Please take notice: That the Steamer ‘Monarch,’ her body, tackle, apparel, machinery, boilers, boats and furniture, insured with you for the sum of Six Thousand (\$6,000.00) Dollars, under your policy No. 40035, in favor of Sacramento Stockton Steamship Company, has been heretofore, to wit: on or about the 15th day of April, 1915, wrecked and lost by perils insured against in your said policy, and the

said Sacramento Stockton Steamship Company hereby abandons to you as insurers on the said vessel, all its right, title and interest in and to the said steamer 'Monarch,' her body, tackle, apparel, machinery, boilers, boats and furniture in the proportion that the sum insured therein bears to the valuation in the said policy, and hereby gives you notice that the said insured intends to claim from you the whole sum insured under said policy as and for a total loss.

Dated, San Francisco, California, June 3d, 1915.

SACRAMENTO STOCKTON STEAM-
SHIP COMPANY,

By GEO. G. GORMLEY,
President.

W. W. COPE,
Secretary."

XV.

That in reply to said Notice of Abandonment the said Hartford Fire Insurance Company did, on the 9th day of June, 1915, serve upon the said Sacramento Stockton Steamship Company its refusal to accept said abandonment, and assigned its reason therefor in words and figures following:

"June 9-15.

Sacramento Stockton Steamship Co.,
Pier 3,

San Francisco, Cal.

Gentlemen: In re Steamship 'Monarch,' we beg to notify you that we refuse to accept the abandonment of your interest in the steamer 'Monarch,' said to have been wrecked and lost on or about the

15th day of April, 1915, and return said letter of abandonment herewith.

Our policy #40035 was rescinded and voided by the unseaworthiness of the said vessel which caused her loss.

Yours very truly,
M. F. BARCLAY,
Special Agent." [6]

XVI.

That it is, in and by the terms of each and all of said policies of insurance aforesaid, among other things, provided that claims, if any, including claim for constructive total loss, are to be adjusted according to English law and practice; that it is the English law and practice that in a time policy of insurance there is no implied warranty that the ship shall be seaworthy at any stage of the adventure.

XVII.

That the said Sacramento Stockton Steamship Company has duly performed all of the conditions in each and all of said policies of insurance contained on its part to be performed.

XVIII.

That each and all of the insurance companies, defendants above named, have refused to pay said insurance, or any part thereof, and no part thereof has been paid.

WHEREFORE, said plaintiff prays for judgment against said Aetna Insurance Company for the sum of Ten Thousand (\$10,000.00) Dollars, together with interest thereon from the 3d day of June, 1915,

and costs of suit; against the said The Union Marine Insurance Company Limited, for the sum of Three Thousand Seven Hundred and Fifty (\$3,750.00) Dollars, together with interest thereon from the 3d day of June, 1915, together with costs of suit; and against the said Hartford Fire Insurance Company for the sum of Six Thousand (\$6,000.00) Dollars, together with interest thereon from the 3d day of June, 1915, together with the costs of suit.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Plaintiff. [7]

State of California,
City and County of San Francisco,—ss.

George G. Gormley, being duly sworn, deposes and says: That at all the times in said complaint mentioned he was, and still is, an officer of the said corporation plaintiff, to wit: the president thereof; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and that as to those matters he believes it to be true.

GEO. G. GORMLEY.

Subscribed and sworn to before me this 8th day of September, 1915.

[Seal] J. A. SCHAERTZER,
Deputy Clerk United States District Court, North-
ern District of California. [8]

Plaintiff's Exhibit "A."

Steamer S. S. "MONARCH"

THIS POLICY IS TO COVER ONLY AS FOLLOWS:

Loss or damage caused by fire, in accordance with the terms and conditions of the regular California Standard Form of Fire policy as issued by the Aetna Insurance Company of Hartford, Conn.

Loss or damage done to another ship or vessel through collision in accordance with the terms and conditions of the following collision clause:

COLLISION CLAUSE.

And it is further agreed that if the Ship hereby insured shall come into collision with any other Ship or Vessel, and the Assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the Ship hereby insured we, the Assurers, will pay the Assured such proportion of four-fourths of such sum or sums so paid as our subscriptions hereto bear to the value of the Ship hereby Insured and in cases in which the liability of the Ship has been contested with our consent in writing, we the Assurers, will also pay a like proportion of four-fourths of the costs which the Assured shall thereby incur or be compelled to pay; but when both Vessels are to blame, then, unless the liability of the Owners of one or both of such Vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the Owners of each Vessel had been compelled to pay to the owners

of the other of such Vessels such one-half or other proportion of the latter's damages, as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of such collision.

PROVIDED ALWAYS THAT THIS CLAUSE SHALL IN NO CASE EXTEND TO ANY SUM WHICH THE ASSURED MAY BECOME LIABLE TO PAY, OR SHALL PAY FOR REMOVAL OF OBSTRUCTIONS UNDER STATUTORY POWERS, FOR INJURY TO HARBORS, WHARVES, PIERS, STAGES, AND SIMILAR STRUCTURES, CONSEQUENT ON SUCH COLLISION, OR IN RESPECT OF THE CARGO OR ENGAGEMENTS OF THE INSURED VESSEL, OR FOR LOSS OF LIFE OR PERSONAL INJURY.

And it is further agreed that the principles involved in this clause shall apply to the case where the vessels are the property in part or in whole of the same owners.

Loss or damage sustained by the vessel insured through collision with another ship or vessel or with wharves, piers, stages, or similar structures if amounting to \$750.—The cost of repairs of such damage being paid without deduction of one-third new for old.

This policy also covers while vessel is at wharves or docks and permission granted to carry passengers, freight, material and supplies incidental to her trade; to make alterations and repairs for a period exceeding 15 consecutive days, and to use kerosene oil, gas, and electricity for lights and crude petroleum for fuel.

Permitted to tow and to be towed and to assist vessels and/or craft in all situations.

Warranted by the Assured confined to San Francisco Bay and/or tributaries, including Sacramento and/or San Joaquin Rivers.

during the currency of this policy.

The foregoing clauses are to be regarded as substituted for the terms of the policy to which they are attached, the latter being hereby waived.

Attached to Policy No. 3563.

J. A. W.

[Printed on left-hand margin] : Subject to Limitations of Trade as Specified in Slip Attached to this Policy.

J. A. W.

It is Agreed that Clauses on Slip Attached Hereto Form Part of This Policy. J. A. W.

Duplicate.

J. A. W.

Marine Department.

AETNA INSURANCE COMPANY.

Hartford, Connecticut.

Incorporated, 1819.

Cash Capital, \$5,000,000.

Pacific Branch, San Francisco, California.

SACRAMENTO-STOCKTON STEAMSHIP COM-
PANY.

On account of Concerned..... Policy No. 31

In case of loss, to be paid in funds current in the United
States to Assured, or order.....

Does make Insurance and cause TEN THOUSAND Sum Insured,
DOLLARS

To be insured from July 22nd, 1914 at Noon, Pacific \$10,000.—
Standard Time to July 22nd, 1915 at Noon, Pacific
Standard Time.

As employment may offer, in port and at sea, in docks
and graving docks, and on ways, gridirons and pontoons, Rate Per Cen
at all times, in all places and on all occasions, services
and trades whatsoever and wheresoever, under steam or Premium 300.
sail, upon the Body, Tackle, Apparel, Ordnance, Muni-
tions, Artillery, Boat and other Furniture of and in the
good Steamer.... called the "MONARCH".....
or by whatsoever other name or names the said ship is
or shall be named or called, beginning the adventure
upon the said ship &c., as above, and shall so continue
and endure during the period as aforesaid. Should the
above vessel be at sea on the expiration of this Policy,
it is agreed to hold her covered until arrival at port of

destination on her being moored therein twenty-four hours in good safety (provided that before the expiration the Assured shall have given notice of intention to so continue) at a pro rata monthly premium, and it shall be lawful for the said ship, &c., to proceed and sail to and touch and stay at any Ports or Places whatsoever and wheresoever without prejudice to this Insurance. The said ship, &c., for so much as concerns the assured, by agreement between the Assured and Assurers [9] in this Policy, are and shall be valued at as follows:

Hull, Tackle, Apparel and Furniture,.....\$

Machinery and Boilers.....\$40,000.—

FORTY THOUSANDDOLLARS

TOUCHING the Adventures and Perils which we, the said insurers, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People, of what Nation, Condition or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses, and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said ship, &c., or any part thereof; and in case of any Loss or Misfortune it shall be lawful to the Insured, their Factors, Servants and Assigns, to sue, labor and travel for, in, and about the Defense, Safeguard and Recovery of the said Ship, &c., or any part thereof, without prejudice to this Insurance; to the charges whereof the said Insurance Com-

pany will contribute according to the Rate and Quantity of the sum herein insured. [Written across face of canceled matter: Void J. A. W.] And it is specially declared and agreed that no acts of the Insurer or Insured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment; having been paid the consideration for this Insurance by the Insured or his or their Assigns, at and after the rate of 3 per cent, to return—per cent, for every 30 consecutive days the vessel may be laid up in port, or in dock; during such period the vessel being at the risk of the Insurers—to return pro rata premium for every 30 days of unexpired time, if this Policy be cancelled and arrival.

Free from average under Three per cent, unless general or the ship be stranded, sunk or burnt, on fire or in collision with another ship or vessel.

[Written across face of canceled matter: Void J. A. W.]

Claims, if any, including claim for constructive total loss, to be adjusted according to English law and practice.

With leave to sail with or without Pilots, to tow and assist vessels and craft in all situations, and to be towed and to go on trial trips.

With liberty to discharge, exchange, and take on board goods, specie, passengers and stores, wherever the vessel may call at or proceed to, without being deemed a deviation, and with liberty to carry goods, live cattle, &c., on deck or otherwise, but warranted free from any claim in respect of jettison of cattle or goods carried on deck. Average payable on each valuation separately, or on the whole. Each voyage to be subject to separate average. In event of damage, cost of repairs to be paid

without deduction of one-third whether the average be particular or general. General average payable as per foreign custom if required, or per York-Antwerp Rules, if in accordance with the contract of affreightment.

[Written across face of canceled matter: Void J. A. W.]

IT IS AGREED, that if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay any sums not exceeding the value of the ship hereby insured, in respect of injury to such other ship or vessel, itself, or to the goods and effects on board thereof, or for loss of freight then being earned upon such goods by such other ship or vessel, the INSURERS will pay the Insured such proportion of three-fourths parts of said sums as the amount hereby insured bears to the value of the ship hereby insured. But this agreement is in no case to be construed as extending to any sums which the Insured may become liable to pay, or shall pay in respect of loss [10] of life or personal injury to individuals, from any cause whatever.

Provided always that this clause shall in no case extend to any sum which the Assured may become liable to pay, or shall pay for the removal of obstructions under statutory powers, for injury to harbors, wharves, piers, stages and similar structures consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury.

[Written across face of canceled matter: Void J. A. W.]

It is agreed that any charge of interest in the vessel hereby insured shall not affect the validity of this Policy.

If there be an Agent of the INSURERS located at or near any place where repairs are made, or proofs of

loss or average taken, said Agent must be represented on the surveys, if any be held, and all bills for repairs, or proofs of loss or average, must be certified to by him, or they will not be allowed by this Company.

IN WITNESS WHEREOF, the said AETNA INSURANCE COMPANY, has caused this Policy to be signed by its President, and attested by its Marine Secretary, at its office in the City of Hartford, and State of Connecticut, and this Policy is made and accepted upon the above expressed conditions, but shall not be valid unless countersigned by the duly authorized Agents of the Company.

Countersigned at SAN FRANCISCO, CAL.

this 22d day of July, 1914.

(Sg.) WM. K. CLARK,

President.

“ W. F. WHITTELSEY, JR.,

Marine Secretary.

(Sg.) E. J. Livingston,

Asst. Gen'l. Agent. [11]

[Printed on right-hand margin]: Warranted free from capture, seizure and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities or warlike operations, whether before or after declaration of war.

[Endorsement]: Hull Time. English Form. No. 3563. Expires, July 22d, 1915. Vessel S. S. “Monarch.” Assured Sacramento-Stockton S. S. Co. Aetna Insurance Company, Hartford, Connecticut. Marine Department. 325 California Street, San Francisco, Cal. \$10,000.— at 3% \$300.— (Stamp) H. Stephenson Smith, General Insurance Agent. [12]

Plaintiff's Exhibit "B."

Steamer S. S. "MONARCH"

THIS POLICY IS TO COVER ONLY AS FOLLOWS:

Loss or damage caused by fire, in accordance with the terms and conditions of the regular California Standard Form of Fire Policy as issued by the Aetna Insurance Company of Hartford, Connecticut.

Loss or damage done to another ship or vessel through collision in accordance with the terms and conditions of the following collision clause:

COLLISION CLAUSE.

And it is further agreed that if the Ship hereby insured shall come into collision with any other Ship or Vessel, and the Assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the Ship hereby insured, we, the Assurers, will pay the Assured such proportion of four-fourths of such sum or sums so paid as our subscriptions hereto bear to the value of the Ship hereby Insured and in cases in which the liability of the Ship has been contested with our consent in writing, we the Assurers, will also pay a like proportion of four-fourths of the costs which the Assured shall thereby incur or be compelled to pay; but when both Vessels are to blame, then, unless the liability of the Owners of one or both of such Vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the Owners of each Vessel had been compelled to pay to the owners

of the other of such Vessels such one-half or other proportion of the latter's damages, as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of such collision.

PROVIDED ALWAYS THAT THIS CLAUSE SHALL IN NO CASE EXTEND TO ANY SUM WHICH THE ASSURED MAY BECOME LIABLE TO PAY, OR SHALL PAY FOR REMOVAL OF OBSTRUCTIONS UNDER STATUTORY POWERS, FOR INJURY TO HARBORS, WHARVES, PIERS, STAGES, AND SIMILAR STRUCTURES, CONSEQUENT ON SUCH COLLISION, OR IN RESPECT OF THE CARGO OR ENGAGEMENTS OF THE INSURED VESSEL, OR FOR LOSS OF LIFE OR PERSONAL INJURY.

And it is further agreed that the principles involved in this clause shall apply to the case where the vessels are the property in part or in whole of the same owners.

Loss or damage sustained by the vessel insured through collision with another ship or vessel or with wharves, piers, stages, or similar structures if amounting to \$750.—The cost of repairs of such damage being paid without deduction of one-third new for old.

This policy also covers while vessel is at wharves or docks and permission granted to carry passengers, freight, material and supplies incidental to her trade; to make alterations and repairs for a period exceeding 15 consecutive days, and to use kerosene oil, gas, and electricity for lights and crude petroleum for fuel.

Permitted to tow and to be towed and to assist vessels and/or craft in all situations.

Warranted by the Assured confined to waters of San Francisco Bay and tributaries, including Sacramento and/or San Joaquin Rivers.

during the currency of this policy.

The foregoing clauses are to be regarded as substituted for the terms of the policy to which they are attached, the latter being hereby waived.

Attached to Policy No. 709.

[Printed on left-hand margin]: It is Agreed that the Clauses on Slip Attached Hereto Form Part of this Policy.

o. 709.

\$3750.00

HULL TIME

THE UNION MARINE INSURANCE COMPANY,
LIMITED,
Head Office

Pacific Coast Branch.

Branch Offices at

11 Dale Street, Liverpool.

Wm. Irving, Manager.

London: 1 Threadneedle Street.

Gallegos, Asst. Manager.

Manchester: 47 Spring Gardens.

Glasgow: 22 Royal Exchange Square.

New York: 37 Wall Street.

H. R. Robertson,

Chairman,

J. Sandeman Allen,

Gen. Manager and Secretary.

Wm. Henderson,

Marine Underwriter.

WHEREAS it hath been proposed to THE UNION MARINE INSURANCE COMPANY, LIMITED, By Sacramento-Stockton Steamship Co., as well in his or their own name as for and in the name or names of all and every other person or persons to whom the subject matter of this Policy does may or shall appertain in part or in all to make with the said Company the Insurance hereinafter mentioned and described.

NOW THIS POLICY WITNESSETH that in consideration of the said person or persons effecting this Policy promising to pay to the said Company the sum of One Hundred Twelve and 50/100 Dollars, as a premium at and after the rate of three per cent, the said Company takes upon itself the burthen of such Insurance to the amount of Thirty-seven hundred fifty and 00/100 Dollars, to be insured from July 22d, 1914 noon Pacific Standard

Time to July 22d, 1915 noon Pacific Standard Time.

As employment may offer, in port and at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places and on all occasions, services and trades whatsoever and wheresoever, under steam or sail, upon the Body, Tackle, Apparel, Ordnance, Munitions, Artillery, Boat and other Furniture of and in the good Steamer called the "MONARCH" or by whatsoever other name or names the said ship is or shall be named or called, beginning the adventure upon the said ship &c., as above, and shall so continue and endure during the period as aforesaid. Should the above vessel be at sea on the expiration of this Policy, it is agreed to hold her covered until arrival at port of destination on her being moored therein twenty-four hours in good safety (provided that before the expiration the Assured shall have given notice of intention to so continue) at a pro rata monthly premium, and it shall be lawful for the said ship, &c., [13] to proceed and sail to and touch and stay at any Ports or Places whatsoever and wheresoever without prejudice to this Insurance. The said ship, &c., for so much as concerns the assured, by agreement between the Assured and Assurers in this Policy, are and shall be valued at as follows:

Hull, Tackle, Apparel and Furniture,.....	\$
Machinery and Boilers.....	\$40,000.00
FORTY THOUSAND AND 00/100.....DOLLARS.	

TOUCHING the Adventures and Perils which we, the said insurers, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-

mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People, of what Nation, Condition or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses, and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said ship, &c., or any part thereof.

In case of any Loss or Misfortune, it shall be lawful to the Insured, their Factors, Servants and Assigns, to sue, labor and travel for, in, and about the Defense, Safeguard and recovery of the said ship, &c., or any part thereof, without prejudice to this Insurance; to the charges whereof the said Insurance Company will contribute according to the Rate and Quantity of the sum herein insured. And it is specially declared and agreed that no acts of the Insurer or Insured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

Free from average under THREE per cent. unless general or the ship be stranded, sunk or burnt, on fire or in collision with another ship or vessel.

Claims, if any, including claim for constructive total loss, to be adjusted according to English law and practice.

With leave to sail with or without Pilots, to tow and assist vessels and craft in all situations, and to be towed and to go on trial trips. With liberty to discharge, exchange, and take on board goods, specie, passengers and stores, wherever the vessel may call at or proceed to, without being deemed a deviation, and with liberty to

carry goods, live cattle, &c., on deck or otherwise, but warranted free from any claim in respect of jettison of cattle or goods carried on deck.

Average payable on each valuation separately, or on the whole. Each voyage to be subject to separate average.

In event of damage, cost of repairs to be paid without deduction of one-third, whether the average be particular or general.

General average payable as per foreign custom if required, or per York-Antwerp Rules, if in accordance with the contract of affreightment.

Warranted free of capture, seizure and detention and the consequences thereof or any attempt thereat piracy excepted and also from all consequences of riots and civil commotions, hostilities or warlike operations whether before or after declaration of war. Warranted free of loss or damage caused by strikers locked-out workmen or persons taking part in labor disturbances or riots or civil commotions.

IN WITNESS WHEREOF this policy has been signed in San Francisco, [14] State of California, this 25th day of July, 1914, for and on behalf of the said Company, by virtue of Power of Attorney granted by said Company in that behalf.

(Sg.) C. WM. HENDERSON,

Underwriter. [15]

[Printed on right-hand margin]: This insurance subject to limitations of trade as per slip attached.

[Endorsed]: (English Form.) Hull Time. The Union Marine Insurance Company, Ltd., of Liverpool. No. 709. Expires July 22, 1915. Vessel S. S. "Monarch." Assured Sacramento-Stockton S. S. Co. \$3750. at 3% \$112.50. W. Irving, Manager Pacific Coast Branch, 343 Sansome St., San Francisco, Cal. (Stamp) H. Stephenson Smith, General Insurance Agent. [16]

Plaintiff's Exhibit "C."**STEAMER "MONARCH"**

THIS POLICY IS TO COVER ONLY AS FOLLOWS:

Loss or damage caused by fire, in accordance with the terms and conditions of the regular California Standard Form of Fire Policy as issued by the Hartford Fire Insurance Company of Hartford, Conn.

Loss or damage done to another ship or vessel through collision in accordance with the terms and conditions of the following collision clause:

COLLISION CLAUSE.

And it is further agreed that if the Ship hereby insured shall come into collision with any other Ship or Vessel, and the Assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the Ship hereby insured, we, the Assurers, will pay the Assured such proportion of four-fourths of such sum or sums so paid as our subscriptions hereto bear to the value of the Ship hereby Insured and in cases in which the liability of the Ship has been contested with our consent in writing, we the Assurers, will also pay a like proportion of four-fourths of the costs which the Assured shall thereby incur or be compelled to pay; but when both Vessels are to blame, then, unless the liability of the Owners of one or both of such Vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the Owners of each Vessel had been compelled to pay to the owners

of the other of such Vessels such one-half or other proportion of the latter's damages, as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of such collision.

PROVIDED ALWAYS THAT THIS CLAUSE IN NO CASE EXTEND TO ANY SUM WHICH THE ASSURED MAY BECOME LIABLE TO PAY, OR SHALL PAY FOR REMOVAL OF OBSTRUCTIONS UNDER STATUTORY POWERS, FOR INJURY TO HARBORS, WHARVES, PIERS, STAGES, AND SIMILAR STRUCTURES, CONSEQUENT ON SUCH COLLISION, OR IN RESPECT OF THE CARGO OR ENGAGEMENTS OF THE INSURED VESSEL, OR FOR LOSS OF LIFE OR PERSONAL INJURY.

And it is further agreed that the principles involved in this clause shall apply to the case where the vessels are the property in part or in whole of the same owners.

Loss or damage sustained by the vessel insured through collision with another ship or vessel, or with wharves, piers, stages, or similar structures if amounting to \$750.00.

The cost of repairs of such damage being paid Without deduction of one-third new for old.

This policy also covers while vessel is at wharves or docks and permission granted to carry passengers, freight, material and supplies incidental to her trade; to make alterations and repairs for a period exceeding 15 consecutive days, and to use kerosene oil, gas, and electricity for lights and crude petroleum for fuel.

Permitted to tow and to be towed and to assist vessels and/or craft in all situations.

Warranted by the Assured confined to waters of San Francisco Bay and tributaries, including Sacramento and/or San Joaquin Rivers.

during the currency of this policy.

The foregoing clauses are to be regarded as substituted for the terms of the policy to which they are attached, the latter being hereby waived.

Attached to Policy No. 40035.

(Sg.) DIXWELL HEWITT,

Gen'l Agt.

MARINE DEPARTMENT.

English Form.

POLICY No. 40035.

HARTFORD FIRE INSURANCE COMPANY,

Hartford, Connecticut.

Sacramento-Stockton Steamship Co.

Sum Insured,

On account of whom concerned..... \$6,000.00.

In case of loss, to be paid in funds current in the United States to Them, or order Rate Per Cent 3%.

Does make Insurance and cause Six Thousand and 00/100 Dollars.

To be insured at and from July 22, 1914, noon Pacific Standard Time to July 22, 1915, noon Pacific Standard Time. Premium.

As employment may offer, in port and at sea, in docks \$180.00.

and graving docks, and on ways, gridirons and pontoons, at all times, in all places and on all occasions, services and trades whatsoever and wheresoever, under steam or sail, upon the Body, Tackle, Apparel, Ordnance, Munitions, Artillery, Boat and other Furniture of and in the good Steamer.... called the "Monarch"..... or by whatsoever other name or names the said ship is or shall be named or called, beginning the adventure upon the said ship &c., as above, and shall so continue

It is a Condition of this Policy that any Broker, Person, Firm, Corporation or individual shall procure this Insurance to be Taken in this Company shall be Deemed to be Exclusively the Agent of the Insured and any and all Transactions and Representations Relating to this Insurance.

[Printed on right-hand margin]: Warranted free from capture, seizure and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities or warlike operations, whether before or after declaration of war.

and endure during the period as aforesaid. Should the above vessel be at sea on the expiration of this Policy, it is agreed to hold her covered until arrival at port of destination on her being moored therein twenty-four hours in good safety (provided that before the expiration the Assured shall have given notice of intention to so continue) at a pro rata monthly premium, and it shall be lawful for the said ship, &c., to proceed and sail to and touch and stay at any Ports or Places whatsoever and wheresoever without prejudice to this Insurance. The said ship, &c., for so much as concerns the assured, by agreement between the Assured and Assurers in this policy, are and shall be valued at as follows:

Hull, Tackle, Apparel and Furniture,.....	\$
Machinery and Boilers.....	\$40,000.—
Forty thousand and 00/100.....	Dollars.

TOUCHING the Adventures and Perils which we, the said insurers, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People, of what Nation, Condition or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses, and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said ship, &c., or any part thereof; and in case of any Loss or Misfortune [17] it shall be lawful to the Insured, their Factors, Servants and Assigns, to sue, labor and travel for, in, and about the Defense, Safeguard and Recovery of the said Ship, &c., or any part thereof, without prejudice to this Insurance; to the charges whereof the said Insurance Com-

pany will contribute according to the Rate and Quantity of the sum herein insured. And it is specially declared and agreed that no acts of the Insurer or Insured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment; having been paid the consideration for this Insurance by the Insured or his or their Assigns, at and after the rate of 3 per cent., to return per cent., for every 30 consecutive days the vessel may be laid up in port, or in dock; during such period the vessel being at the risk of the Insurers—to return pro rata premium for every 30 days of unexpired time, if this Policy be cancelled and arrival.

Free from average under THREE per cent., unless general or the ship be stranded, sunk or burnt, on fire or in collision with another ship or vessel.

Claims, if any, including claim for constructive total loss, to be adjusted according to English law and practice.

With leave to sail with or without Pilots, to tow and assist vessels and craft in all situations, and to be towed and to go on trial trips.

With liberty to discharge, exchange, and take on board goods, specie, passengers and stores, wherever the vessel may call at or proceed to, without being deemed a deviation, and with liberty to carry goods, live cattle, &c., on deck or otherwise, but warranted free from any claim in respect of jettison of cattle or goods carried on deck. Average payable on each valuation separately, or on the whole. Each voyage to be subject to separate average. In event of damage, cost of repairs to be paid without deduction of one-third whether the average be particular or general. General average payable as per

foreign custom if required, or per York-Antwerp Rules, if in accordance with the contract of affreightment.

IT IS AGREED, that if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay any sums not exceeding the value of the ship hereby insured, in respect of injury to such other ship or vessel, itself, or to the goods and effects on board thereof, or for loss of freight then being earned upon such goods by such other ship or vessel, the INSURERS will pay the Insured such proportion of three-fourths parts of said sums as the amount hereby insured bears to the value of the ship hereby insured. But this agreement is in no case to be construed as extending to any sums which the Insured may become liable to pay, or shall pay in respect of loss of life or personal injury to individuals, from any cause whatever.

Provided always that this clause shall in no case extend to any sum which the Assured may become liable to pay, or shall pay for the removal of obstructions under statutory powers, for injury to harbors, wharves, piers, stages and similar structures consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury.

It is agreed that any change of interest in the vessel hereby insured shall not affect the validity of this Policy,

If there be an Agent of the INSURERS located at or near any place where repairs are made, or proofs of loss or average taken, said Agent must be represented on the surveys, if any be held, and all bills for repairs, or proofs of loss or average, must be certified to by him, or they will not be allowed by this Company. [18]

IN WITNESS WHEREOF, this company has executed and attested these presents, this 22d day of July, 1914. This policy shall not be valid until countersigned by the duly authorized general agent of the company at
Hartford, Conn.
San Francisco, Cal.

(Sg.) R. M. BISSELL,
President.

(Sg.) Fred'k Samson, Secretary.

Countersigned by DIXWELL HEWITT, General Agent. [19]

[Endorsement]: Hull Time. English Form. Issued to Sacramento-Stockton Steamship Co. Amount Insured, \$6,000.00. Rate 3%, Premium, \$180.00. Expires, July 22, 1915. No. 40035. Vessel. Steamer "Monarch."
Valued.

Marine and Transportation Department. Hartford Fire Insurance Company. Hartford, Conn. San Francisco Agency, 441 California Street. (Stamp) H. Stephenson Smith, General Insurance Agent.

[Endorsed]: Filed Sep. 8, 1915. W. B. Maling, Clerk.
By J. A. Schaertzer, Deputy Clerk. [20]

UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California, Second Division.

THE SACRAMENTO STOCKTON STEAMSHIP COMPANY, a Corporation,
Plaintiff,

vs.

THE AETNA INSURANCE COMPANY, a Corporation, THE UNION MARINE INSURANCE COMPANY, LIMITED, a Corporation, THE HARTFORD FIRE INSURANCE COMPANY, a Corporation,
Defendants.

Summons.

Action brought in said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the City and County of San Francisco.

NATHAN H. FRANK and
IRVING H. FRANK,

Plaintiff's Attorneys.

The President of the United States of America,
Greeting:

To the Aetna Insurance Company, a Corporation,
The Union Marine Insurance Company, Limited, a Corporation, The Hartford Fire Insurance Company, a Corporation, Defendants.

YOU ARE HEREBY DIRECTED TO APPEAR, and answer the Complaint in an action

entitled as above, brought against you in the District Court of the United States, in and for the Northern District of California, Second Division, within ten days after the service on you of this summons—if served within this county; or within thirty days if served elsewhere.

You are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or it will apply to the Court for any other relief demanded in the complaint.

WITNESS the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 8th day of September, in the year of our Lord one thousand nine hundred and fifteen, and of our Independence the one hundred and fortieth.

[Seal]

WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk. [21]

MARSHAL'S RETURN.

Northern District of California.

I hereby certify and return, that on the 10th day of Sept., 1915, I received the within summons and herewith return the same unexecuted as to the defendant, The Aetna Insurance Company, a corporation.

J. B. HOLOHAN,
United States Marshal.
By Lawrence J. Conlon,
Deputy United States Marshal.

RETURN ON SERVICE OF WRIT.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed summons on the therein-named The Hartford Fire Insurance Company, a corp., by handing to and leaving a true and correct copy thereof, together with copy complaint attached thereto, with Dixwell Hewitt, General Agent The Hartford Fire Insurance Company, a corp., personally at San Francisco, in said District, on the 10th day of September, A. D. 1915.

J. B. HOLOHAN,
U. S. Marshal.

By Lawrence J. Conlon,
Deputy. [22]

United States Marshal's Office,
Northern District of California.

I hereby certify, that I received the within writ on the 10th day of Sept., 1915, and personally served the same on the 10th day of Sept., 1915, upon The Union Marine Insurance Company, Limited, a corp., by delivering to, and leaving with C. Wm. Henderson, Marine Underwriter for The Union Insurance Company, Limited, a corp. Said defendant named therein personally, at the City and County of San Francisco, in said District, a

certified copy thereof, together with a copy of the Complaint, attached thereto.

J. B. HOLOHAN,
U. S. Marshal.

By Lawrence J. Conlon,
Office Deputy.

San Francisco, Sept. 10th, 1915.

[Endorsed]: Filed Sep. 27, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [23]

In the District Court of the United States in and
for the Northern District of California, Second
Division.

No. 15,930.

THE SACRAMENTO STOCKTON STEAM-
SHIP COMPANY, a Corporation,
Plaintiff,

vs.

THE AETNA INSURANCE COMPANY, a Cor-
poration, THE UNION MARINE INSUR-
ANCE COMPANY, LIMITED, a Corpora-
tion, THE HARTFORD FIRE INSUR-
ANCE COMPANY, a Corporation,
Defendants.

Defendants' Demurrer to Complaint.

Now comes the above-named defendants, The Aetna Insurance Company, The Union Marine Insurance Company, Limited, and The Hartford Fire Insurance Company, and each of them, and do each of them demur to the complaint of plaintiff on file

in the above-entitled action, on the following grounds, to wit:

I. That said complaint does not state facts sufficient to constitute a cause of action.

II. That said complaint does not state facts sufficient to constitute a cause of action against defendant, The Aetna Insurance Company, a corporation.

III. That said complaint does not state facts sufficient to constitute a cause of action against defendant The Union Marine Insurance Company, Limited, a corporation.

IV. That said complaint does not state facts sufficient [24] to constitute a cause of action against defendant The Hartford Fire Insurance Company, a corporation.

V. That said complaint is uncertain in the following particulars, to wit:

1. That whereas it is alleged in paragraph IX of said complaint that on or about the 15th day of April, 1915, the said steamer "Monarch" was wrecked and totally lost by perils in "said policy" named and thereby insured against, it does not appear in said complaint, nor can it be ascertained therefrom, what policy is referred to or intended to be referred to as "said policy," three policies of insurance having been theretofore mentioned in paragraphs VI, VII and VIII, respectively, of said complaint, and being annexed thereto as Exhibits "A," "B" and "C," respectively.

2. That whereas it is alleged in paragraph IX of said complaint that on or about the 15th day of

April, 1916, the said steamer "Monarch" was wrecked and totally lost by perils in said policy named and thereby insured against, it does not appear in said complaint, nor can it be ascertained therefrom, by which, if any, of the several perils or causes of loss or damage enumerated in each of the three policies of insurance mentioned in paragraphs VI, VII and VIII, respectively, of said complaint, and annexed thereto as Exhibits "A," "B" and "C," respectively, said steamer "Monarch" is claimed to have been wrecked and totally lost.

VI. That said complaint is ambiguous in each of the respects and particulars in which it is hereinabove in paragraph V alleged to be uncertain.

VII. That said complaint is unintelligible in each of the respects and particulars in which it is hereinabove in [25] paragraph V alleged to be uncertain.

WHEREFORE, said defendants, The Aetna Insurance Company, The Union Marine Insurance Company, Limited, and The Hartford Fire Insurance Company, and each of them, pray that plaintiff take nothing by its said complaint, and that they and each of them be hence dismissed with their costs.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for said Defendants.

We hereby certify that the foregoing demurrer is, in our opinion, well founded in point of law and

that the same is not interposed for delay.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for said Defendants.

Service of the within demurrer and receipt of a copy is hereby admitted this 23 day of October, 1915.

NATHAN H. FRANK,

Atty. for Plff.

[Endorsed]: Filed Oct. 25, 1915. Walter B. Mal-
ing, Clerk. [26]

In the District Court of the United States in and
for the Northern District of California, Second
Division.

No. 15,930.

THE SACRAMENTO STOCKTON STEAM-
SHIP COMPANY, a Corporation,

Plaintiff,

vs.

THE AETNA INSURANCE COMPANY, a Cor-
poration, THE UNION MARINE INSUR-
ANCE COMPANY, LIMITED, a Corpora-
tion, THE HARTFORD FIRE INSUR-
ANCE COMPANY, a Corporation,

Defendants.

Notice of Motion and Motion.

To the Plaintiff in the Above-entitled Action and
to Nathan H. Frank, Esq., and Irving H.
Frank, Esq., Its Attorneys:

YOU AND EACH OF YOU will please take notice that the defendants, The Aetna Insurance Company, The Union Marine Insurance Company, Limited, and The Hartford Fire Insurance Company, and each of them, hereby move, and on Monday, the first day of November, 1915, at the opening of court on that day, or as soon thereafter as counsel can be heard, said defendants, and each of them, will move this Honorable Court, at the courtroom thereof, in the United States Courthouse, in the Postoffice Building, at the northeast corner of Seventh and Mission Streets, in the City of San Francisco, State of California, for an order requiring plaintiff to make its complaint in this action more definite and certain in the following particulars, to wit:

1. That plaintiff be required to state which, if any, of the three policies of insurance mentioned in paragraphs VI, VII and VIII, respectively, of its complaint, and annexed thereto as Exhibits "A," "B" and "C," respectively, is referred to as "said policy" in paragraph IX of said complaint.

2. That plaintiff be required to state with reference to paragraph IX of its complaint, wherein it is alleged that on or [26a] about the 15th day of April, 1915, the said steamer "Monarch" was wrecked and totally lost by perils in said policy named and thereby insured against, by which, if any, of the several perils of causes of loss or damage enumerated in each of the three policies of insurance mentioned in paragraphs VI, VII, VIII, respectively, of its complaint, and annexed thereto

as Exhibits "A," "B" and "C," respectively, plaintiff claims said steamship to have been wrecked and totally lost.

Said motion will be made upon the ground that said complaint is indefinite and uncertain in the particulars hereinabove specified, and upon the hearing of said motion said defendants and each of them will rely upon and use said complaint and this notice of motion and motion.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for said Defendants.

Service of the within notice of motion, etc., and receipt of a copy is hereby admitted this 23d day of October, 1915.

NATHAN H. FRANK,

Atty. for Plff.

[Endorsed]: Filed Oct. 25, 1915. Walter B. Maling, Clerk. [26b]

At a stated term, to wit, the November term, A. D. 1915, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 1st day of November, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,930.

THE SACRAMENTO STOCKTON S. S. CO.

vs.

THE AETNA INSURANCE COMPANY, et al.

**(Order Denying Motion to Make Complaint More
Certain, etc.)**

Defendants' demurrer to complaint and motion to make complaint more certain, came on to be heard and after arguments, being submitted and fully considered, it is ordered that said motion be and the same is hereby denied and that said demurrer be and the same is hereby overruled. [27]

In the United States District Court for the Northern District of California, Second Division.

THE SACRAMENTO STOCKTON STEAMSHIP COMPANY, a Corporation,
Plaintiff,

vs.

THE AETNA INSURANCE COMPANY, a Corporation, THE UNION MARINE INSURANCE COMPANY, LIMITED, a Corporation, THE HARTFORD FIRE INSURANCE COMPANY, a Corporation,
Defendants.

Answer.

Come now the above-named defendants, and each of them, and, in answer to the allegations of the

complaint herein, admit, deny and allege, as follows:

I.

Defendants admit the allegations of paragraph I of said complaint.

II.

Defendants admit the allegations of paragraph II of said complaint.

III.

Defendants admit the allegations of paragraph III of said complaint.

IV.

Defendants admit the allegations of paragraph IV of said complaint. [28]

V.

Answering unto paragraph V of said complaint, defendants have no information or belief upon the subject sufficient to enable them to answer the allegations therein contained, and placing their denials on that ground, deny that at all or any of the times therein in said complaint mentioned, the said Sacramento Stockton Steamship Company was the owner of the steamer therein after referred to and called, or called, the "Monarch," together with her body, or tackle, or apparel, or boats, or other furniture.

VI.

Defendants admit the allegations of paragraph VI of said complaint.

VII.

Defendants admit the allegations of paragraph VII of said complaint.

VIII.

Defendants admit the allegations of paragraph VIII of said complaint.

IX.

Answering paragraph IX of said complaint, said defendants admit that on or about the 15th day of April, 1915, the said steamer "Monarch" was wrecked; allege that they have no information upon the subject sufficient to enable them to answer as to whether said vessel was or became a total loss, and therefore deny that said vessel was or became a total loss, as alleged in said paragraph IX of said complaint, or otherwise; said defendants deny that on or about the 15th day of April, 1915, or at any time, or at all, said steamer was wrecked and totally, or otherwise, lost, or wrecked or totally, or otherwise, lost, by perils, or by any peril, in said policies, or in any of said policies, named and thereby insured against, or by perils, or by any peril, in said policies, or in any of said policies, named or thereby insured against. [29]

X.

Answering said paragraph IX of said complaint, said defendants admit that on or about the third day of June, 1915, plaintiff served a purported notice of abandonment upon the defendant herein, Aetna Insurance Company, which said purported notice of abandonment was in the words and figures set forth in said paragraph X of said complaint; said defendants deny that said purported notice of abandonment was, or is, a valid notice of abandonment, or that at the time of serving same, as afore-

said, or ever or at all, said plaintiff was entitled to abandon said steamer "Monarch," or its right, title or interest therein to the said defendant, Aetna Insurance Company.

XI.

Answering paragraph XI of said complaint, said defendants admit that in reply to said purported notice of abandonment mentioned in paragraph X hereof, said Aetna Insurance Company did, on the eighth day of June, 1915, serve upon plaintiff a letter, a correct copy of which is set forth in paragraph XI of said complaint. Said defendants deny that in reply to said purported notice of abandonment set forth in paragraph X of said complaint, the said defendant, Aetna Insurance Company, did, on the eighth day of June, 1915, or ever or at all, serve upon plaintiff its refusal to accept said or any abandonment, and assigned its reason therefor in words and figures, or words or figures, as set forth in said paragraph XI of said complaint, or that in reply to said purported notice of abandonment set forth in paragraph X in said complaint, or otherwise, the said defendant, Aetna Insurance [30] Company did, on the eighth day of June, 1915, or at any time or at all, serve upon said plaintiff its refusal to accept said or any abandonment, or assign its reason therefor in words and figures, or in words or figures as set forth in said paragraph.

Said defendants admit that in and by said letter said defendant, Aetna Insurance Company, did, on the eighth day of June, 1915, notify plaintiff that it refused to accept its purported abandonment referred to in paragraph X hereof, but said defend-

ants deny that in and by said letter said defendant, Aetna Insurance Company intended to state, or that it in fact stated, to said plaintiff, or intended to advise, or that it in fact advised, said plaintiff of its reasons for refusing to accept said purported abandonment; that said last-mentioned letter contained the following statement, to wit:

“Our policy No. 3563 was rescinded and voided by the unseaworthiness of said vessel which caused her loss,”

but that said letter did not contain, nor did said defendant in any way make to plaintiff, any statement to the effect that said rescission or said voiding of said policy by the unseaworthiness of said vessel which caused her loss was the reason, or was one of the reasons, why said defendant refused to accept the said purported abandonment. That on said eighth day of June, 1915, and at the time of the receipt of said letter by said plaintiff, it was well known to said plaintiff that the aforesaid wreck and loss of said steamer “Monarch” was not occasioned by any of the perils named in the policy of insurance referred to in paragraph VI of said complaint, or thereby insured against, and said plaintiff then and there well knew that by reason thereof and for other and additional reasons, [31] it was not entitled to abandon its interest in said “Monarch” to said defendant, Aetna Insurance Company. That the statement in said letter that

“Our policy No. 3563 was rescinded and voided by the unseaworthiness of said vessel which caused her loss,”

was not intended to be, and was not in fact, inserted in said letter by defendant as stating the reason for the refusal of said defendant, Aetna Insurance Company, to accept said purported abandonment, nor as the sole reason therefor, nor even as one of the reasons therefor but was inserted in said letter for the sole purpose of calling the fact referred to to the attention of said plaintiff, all of which was at all times well known to and understood by plaintiff. That plaintiff was not entitled to any notice from said defendant, Aetna Insurance Company, whatsoever, respecting its purported notice of abandonment, nor did said plaintiff in any way rely upon or predicate any action whatsoever upon receipt of the said letter from said defendant, Aetna Insurance Company.

XII.

Answering paragraph XII of said complaint, said defendants admit that on or about the third day of June, 1915, plaintiff served a purported notice of abandonment upon the defendant herein, Union Marine Insurance Company, which said purported notice of abandonment was in the words and figures set forth in said paragraph XII of said complaint; said defendants deny that said purported notice of abandonment was, or is, a valid notice of abandonment, or that at the time of serving same, as aforesaid, or ever or at all, said plaintiff was entitled to abandon said steamer "Monarch," or its right, title or interest therein to the said defendant, Union Marine [32] Insurance Company.

XIII.

Answering paragraph XIII of said complaint, said defendants admit that in reply to said purported notice of abandonment mentioned in paragraph XIII hereof, said Union Marine Insurance Company did, on the fifth day of June, 1915, serve upon plaintiff a letter, a correct copy of which is set forth in paragraph XIII of said complaint. Said defendants deny that in reply to said purported notice of abandonment set forth in paragraph XII of said complaint, the said defendant, Union Marine Insurance Company, did, on the fifth day of June, 1915, or ever or at all, serve upon plaintiff its refusal to accept said or any abandonment, and assigned its reason therefor in words and figures, or words or figures, as set forth in said paragraph XIII of said complaint, or that in reply to said purported notice of abandonment set forth in paragraph XII in said complaint, or otherwise, the said defendant, Union Marine Insurance Company, did, on the fifth day of June, 1915, or at any time or at all, serve upon said plaintiff its refusal to accept said or any abandonment, or assign its reason therefor in words and figures, or in words or figures as set forth in said paragraph.

Said defendants admit that in and by said letter said defendant, Union Marine Insurance Company, did, on the fifth day of June, 1915, notify plaintiff that it refused to accept its purported abandonment referred to in paragraph XII hereof, but said defendants deny that in and by said letter said defendant, Union Marine Insurance Company, intended to

state, or that it in fact stated, to said plaintiff, or intended to advise, or that it in fact advised, said plaintiff of its [33] reason for refusing to accept said purported abandonment; that said last-mentioned letter contained the following statement, to wit:

“Our policy No. 709 was rescinded and voided by the unseaworthiness of said vessel which caused her loss,”

but that said letter did not contain, nor did said defendant in any way make to plaintiff, any statement to the effect that said rescission or said voiding of said policy by the unseaworthiness of said vessel which caused her loss was the reason, or was one of the reasons, why said defendant refused to accept the said purported abandonment. That on said fifth day of June, 1915, and at the time of the receipt of said letter by said plaintiff, it was well known to said plaintiff that the aforesaid wreck and loss of said steamer “Monarch” was not occasioned by any of the perils named in the policy of insurance referred to in paragraph VII of said complaint, or thereby insured against, and said plaintiff then and there well knew that by reason thereof and for other and additional reasons it was not entitled to abandon its interest in said “Monarch” to said defendant, Union Marine Insurance Company. That the statement in said letter that

“Our policy No. 709 was rescinded and voided by the unseaworthiness of said vessel which caused her loss,”

was not intended to be, and was not in fact, inserted in said letter by defendant as stating the reason for the refusal of said defendant, Union Marine Insurance Company, to accept said purported abandonment, nor as the sole reason therefor, nor even as one of the reasons therefor, but was inserted in said letter for the sole purpose of calling the fact referred to to the attention of said plaintiff, all of which was at all times [34] well known to and understood by plaintiff. That plaintiff was not entitled to any notice from said defendant, Union Marine Insurance Company, whatsoever, respecting its purported notice of abandonment, nor did said plaintiff in any way rely upon or predicate any action whatsoever upon receipt of the said letter from said defendant, Union Marine Insurance Company.

XIV.

Answering paragraph XIV of said complaint, said defendants admit that on or about the third day of June, 1915, plaintiff served a purported notice of abandonment upon the defendant herein, Hartford Fire Insurance Company, which said purported notice of abandonment was in the words and figures set forth in said paragraph XIV of said complaint; said defendants deny that said purported notice of abandonment was, or is, a valid notice of abandonment, or that at the time of serving same, as aforesaid, or ever, or at all, said plaintiff was entitled to abandon said steamer "Monarch," or its right, title or interest therein to the said defendant, Hartford Fire Insurance Company.

XV.

Answering paragraph XV of said complaint, said defendants admit that in reply to said purported notice of abandonment mentioned in paragraph XV thereof, said Hartford Fire Insurance Company did, on the ninth day of June, 1915, serve upon plaintiff a letter, a correct copy of which is set forth in paragraph XV of said complaint. Said defendants deny that in reply to said purported notice of abandonment set forth in paragraph XV of said complaint, the said defendant, Hartford Fire Insurance Company, did, on the ninth day of June, 1915, or ever, or at all, serve upon plaintiff its refusal to [35] accept said or any abandonment, and assigned its reason therefor in words and figures, or words or figures, as set forth in said paragraph XV of said complaint, or that in reply to said purported notice of abandonment set forth in paragraph XV of said complaint, or otherwise, the said defendant, Hartford Fire Insurance Company, did, on the ninth day of June, 1915, or at any time, or at all, serve upon said plaintiff its refusal to accept said or any abandonment, or assign its reason therefor in words and figures, or in words or figures, as set forth in said paragraph.

Said defendants admit that in and by said letter said defendant, Hartford Fire Insurance Company, did, on the ninth day of June, 1915, notify plaintiff that it refused to accept its purported abandonment referred to in paragraph XV hereof, but said defendants deny that in and by said letter said defendant, Hartford Fire Insurance Company, in-

tended to state, or that it in fact stated, to said plaintiff, or intended to advise, or that it in fact advised, said plaintiff of its reasons for refusing to accept said purported abandonment; that said last mentioned letter contained the following statement, to wit:

“Our policy #40,035 was rescinded and voided by the unseaworthiness of said vessel which caused her loss.”

but that said letter did not contain, nor did said defendant in any way make to plaintiff, any statement to the effect that said rescission or said voiding of said policy by the unseaworthiness of said vessel, which caused her loss, was the reason, or was one of the reasons, why said defendant refused to accept the said purported abandonment. That on said ninth day of June, 1915, and at the time of the receipt of said [36] letter by plaintiff, it was well known to said plaintiff that the aforesaid wreck and loss of said steamer “Monarch” was not occasioned by any of the perils named in the policy of insurance referred to in paragraph VIII of said complaint, or thereby insured against, and said plaintiff then and there well knew that by reason thereof and for other and additional reasons it was not entitled to abandon its interest in said “Monarch” to said defendant, Hartford Fire Insurance Company. That the statement in said letter that

“Our policy #40,035 was rescinded and voided by the unseaworthiness of said vessel which caused her loss,”

was not intended to be, and was not in fact, inserted in said letter by defendant as stating the reason for

the refusal of said defendant, Hartford Fire Insurance Company, to accept said purported abandonment, nor as the sole reason therefor, nor even as one of the reasons therefor, but was inserted in said letter for the sole purpose of calling the fact referred to to the attention of said plaintiff, all of which was at all times well known to and understood by plaintiff. That plaintiff was not entitled to any notice from said defendant, Hartford Fire Insurance Company, whatsoever, respecting its purported notice of abandonment, nor did said plaintiff in any way rely upon or predicate any action whatsoever upon receipt of the said letter from said defendant, Hartford Fire Insurance Company.

XVI.

Answering paragraph XVI of said complaint, said defendants deny that it is in and by, or in or by, the terms, or any of the terms, of each and all of said policies of insurance, or of any of said policies of insurance, referred to in said [37] complaint, provided that the liability of said defendants, or of any of them, under said policies, or any of them, including liability for constructive total loss, or otherwise, is to be determined according to English law and practice, or to English law or practice; admits that it is English law and practice that in a time policy of insurance there is no applied warranty that a ship shall be seaworthy at any stage of the adventure, but alleges in this behalf that it is also the English law and practice, with respect to such time policy, that where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the

insurer is not liable for any loss attributable to such unseaworthiness.

XVII.

Answering paragraph XVII of said complaint, said defendants deny that the plaintiff has duly or otherwise performed all of the conditions in each and all, or in each or all, or in any, of the policies of insurance referred to in said complaint, on its part to be performed.

XVIII.

Answering paragraph XVIII of the complaint, said defendants admit the allegations thereof.

And for a further, separate and distinct answer and defense to the complaint herein, and to the alleged cause of action, or causes of action, contained therein, defendants allege:

Allege that at the time of the wrecking and loss of the said steamer "Monarch," referred to in said complaint, said [38] "Monarch" was unseaworthy in that the seams and the caulking in the seams of the hull of said "Monarch" were insufficient to withstand the seas, which it was reasonable to expect said vessel would encounter upon its voyage, and which were encountered upon said voyage; that defendants are advised and believe and therefore allege that said vessel was unseaworthy as aforesaid with the privity of the plaintiff, and the said unseaworthiness of said vessel was known to plaintiff, and that nevertheless the said vessel was sent on its voyage by the said plaintiff in said unseaworthy condition; that by reason of said unseaworthy condition of said vessel as aforesaid, and not otherwise, said vessel was

wrecked and lost. That thereafter and on or about the 3d day of June, 1915, said defendants and each of them rescinded said policies referred to in said complaint, and each of them respectively, because of the unseaworthiness of said vessel as aforesaid, and gave to said plaintiff due notice that said policies, and each of them, were so rescinded.

And for a second, further, separate and distinct answer and defense to said complaint, and to the alleged cause of action, or causes of action, contained therein, defendants allege:

That it is in and by the terms of each and all of the policies of insurance referred to in the complaint herein, among other things, provided that claims, if any, including claim for constructive total loss, are to be adjusted according to English law and practice; that it is the English law and practice that in a time policy of insurance, notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, or, where information is of a doubtful character, the assured is entitled to a reasonable time to make inquiry;

That said steamer "Monarch" was wrecked and lost, but, [39] as defendants are informed and believe and therefore allege, not totally lost, on or about the 15th day of April, 1915; that plaintiff had reliable information of the said loss immediately after the occurrence thereof;

That no notice or notices of abandonment, or purported notice or purported notices of abandonment, was or were served upon defendants, or any of them, by plaintiff, except as alleged in said complaint; that

the purported notices of abandonment referred to in paragraphs X, XII and XIV of the complaint herein, were served upon the defendants herein on June 13th, 1915, and not prior thereto;

That said last-mentioned notices of abandonment were not given with reasonable diligence by said plaintiff to said defendants, or any of them, after the receipt by said plaintiff of reliable information of the said loss; that the plaintiff's information as to said loss was not of a doubtful character, but that in any event, the time elapsed between the receipt of said information and the giving of said purported notices of abandonment greatly exceeded what would have been a reasonable time for said plaintiff to make inquiries as to said loss.

And for a third, further, separate and distinct answer and defense to said complaint, and to the alleged cause of action, or causes of action, contained therein, defendants allege:

That the wrecking and loss of said steamer "Monarch" was not caused by the perils, or any of the perils in said [40] policies, or in any of said policies, named or thereby insured against; that if said wrecking or loss was proximately caused by the perils in said policies, or any of them, named and thereby insured against, or by any peril in said policies, or any of them, named or thereby insured against, nevertheless the said wrecking and loss were remotely caused thereby, and would not have occurred but for a peril excepted in the said policies of insurance and in each of said policies.

And for a fourth, further, separate and distinct

answer and defense to said complaint, and to the alleged cause of action, or causes of action, contained therein, defendants allege:

That the purported notices of abandonment referred to in paragraphs X, XII and XIV of said complaint were, and each of them was, insufficient, in that they were not, nor was any of them, explicit, nor did they, nor did any of them, specify the particular cause of the alleged abandonment, nor did they, nor did any of them, state enough to show that there existed probable cause for said alleged abandonment.

WHEREFORE, defendants pray that plaintiff take nothing against said defendants, or any of them, by its said complaint, and that said defendants, and each of them, have judgment against plaintiff for their and each of their respective costs herein incurred.

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Defendants. [41]

United States of America,

Northern District of California,—ss.

Ira A. Campbell, being first duly sworn, deposes and says:

That he is a member of the firm of McCutchen, Olney & Willard, attorneys of record for the defendants in the above-entitled action; that he has charge of the defense of said action in behalf of said firm for said defendants;

That all of the officers of said defendant corporations, and of each of said defendant corporations, are absent from the county where said attorneys

have their office, to wit, are absent from the City and County of San Francisco, State of California, and are absent from the State of California; that therefore affiant makes this affidavit for and on behalf of said defendants;

That affiant has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

IRA A. CAMPBELL,

Subscribed and sworn to before me this 15th day of December, 1915.

[Notarial Seal]

WM. D. PAGE,

Notary Public in and for the City and County of San Francisco, State of California. [42]

Service of the within answer and receipt of a copy is hereby admitted this 15th day of December, 1915.

NATHAN H. FRANK,

Attorney for Plaintiff.

[Endorsed]: Filed Dec. 15, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [43]

In the District Court of the United States, in and
for the Northern District of California, Second
Division.

No. 15,930.

THE SACRAMENTO STOCKTON STEAMSHIP
COMPANY, a Corporation,

Plaintiff,

vs.

THE AETNA INSURANCE COMPANY, a Cor-
poration, THE UNION MARINE INSUR-
ANCE COMPANY, LIMITED, a Corporation,
THE HARTFORD FIRE INSURANCE
COMPANY, a Corporation,

Defendants.

Verdict.

We, the jury, find in favor of the plaintiff and
assess the damages against the defendants as follows,
namely: Against the said defendant, The Aetna In-
surance Company, a corporation, in the sum of Ten
thousand five hundred forty-six & 38/100 (\$10,546.
38) Dollars; against the said defendant, The Union
Marine Insurance Company, Limited, a corporation,
in the sum of three thousand nine hundred fifty-four
& 90/100 (\$3,954.90) Dollars, and against the said
defendant, The Hartford Fire Insurance Company,
a corporation, in the sum of six thousand three
hundred twenty-seven 83/100 (\$6,327.83) Dollars.

N. A. JUDD,

Foreman.

[Endorsed]: Filed June 16, 1916. Walter B. Maling, Clerk. [44]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,930.

THE SACRAMENTO STOCKTON STEAMSHIP
COMPANY, a Corporation,

Plaintiff,

vs.

THE AETNA INSURANCE COMPANY, a Corporation,
THE UNION MARINE INSURANCE COMPANY, LIMITED, a Corporation,
THE HARTFORD FIRE INSURANCE COMPANY, a Corporation,

Defendants.

Judgment on Verdict.

This cause having come on regularly for trial upon the 15th day of June, 1916, being a day in the March 1916 Term of said Court, before the Court and a jury of twelve men duly empaneled and sworn to try the issues joined herein; Nathan H. Frank, Esq., appearing as attorney for plaintiff and Ira A. Campbell, Esq., appearing as attorney for defendants; and the trial having been proceeded with on the 16th day of June in said year and term, and oral and documentary evidence upon behalf of the respective parties having been introduced and closed and the cause having been

submitted to the jury, with instructions by the Court to find in favor of the plaintiff, and the jury having subsequently rendered the following verdict, which was ordered recorded, namely: "We, the jury, find in favor of the plaintiff and assess the damages against the defendants as follows, namely: Against the said defendant, The Aetna Insurance Company, a corporation, in the sum of Ten thousand five hundred forty-six & 38/100 (\$10,546.38) Dollars; against the said defendant, The Union Marine Insurance Company, Limited, a corporation, in the sum of Three thousand nine hundred fifty-four 90/100 (\$3954.90) Dollars, and against the said defendant, The Hartford Fire [45] Insurance Company, a corporation, in the sum of Six thousand three hundred twenty--seven 83/100 (\$6327.83) Dollars. N. A. Judd, Foreman," and the Court having ordered, that judgment be entered in accordance with said verdict and for costs:

Now therefore, by virtue of the law and by reason of the premises aforesaid, it is ordered by the Court, that The Sacramento Stockton Steamship Company, a corporation, plaintiff, do have and recover of and from The Aetna Insurance Company, a corporation, defendant, the sum of Ten thousand five hundred forty-six and 38/100 (\$10,546.38) Dollars; and that said plaintiff do have and recover of and from The Union Marine Insurance Company, Limited, a corporation, defendant, the sum of Three thousand nine hundred fifty-four and 90/100 (\$3954.90) Dollars; and that said plaintiff do have and recover of and from The Hartford Fire Insurance Company, a cor-

poration, defendant the sum of Six thousand three hundred twenty-seven and 83/100 (\$6327.83) together with plaintiffs costs herein expended taxed at \$57.00.

Judgment entered June 16, 1916.

WALTER B. MALING,
Clerk.

A True Copy.

Attest;—[Seal] WALTER B. MALING, Clerk.

[Endorsed]: Filed June 16, 1916. Walter B. Maling, Clerk. [46]

In the District Court of the United States for the
Northern District of California.

No. 15,930.

THE SACRAMENTO STOCKTON S. S. CO.,
vs.

THE AETNA INS. CO. a Corp., et al.

(Clerk's Certificate to Judgment-roll.)

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court, this 16th day of June, 1916.

[Seal] WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Judgment-roll. Filed June 16, 1916. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Recorded Judgment Register No. 14, page 258.
[47]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 15,930.

SACRAMENTO-STOCKTON STEAMSHIP
COMPANY, a Corporation,

Plaintiff,

vs.

AETNA INSURANCE COMPANY, a Corporation,
UNION MARINE INSURANCE
COMPANY, a Corporation, and HART-
FORD FIRE INSURANCE COMPANY, a
Corporation,

Defendants and Petitioners.

Engrossed Bill of Exceptions.

BE IT REMEMBERED that on the 15th day of June, 1916, at a stated term of the District Court of the United States, for the Northern District of California, the above-entitled cause came on regularly for trial before the Honorable William C. Van Fleet, Judge of the said court, the jury having been duly impanelled, Nathan H. Frank, Esq., appearing as attorney for the plaintiff and Ira A.

Campbell, Esq., appearing as attorney for the defendants.

And thereupon the following proceedings were had:

Mr. Frank made the following opening statement:

“I do not think it will be necessary for me to make any extended statement to you, gentlemen, [48] “in this case. The issues that will be presented to the jury are very narrow indeed, if indeed there is anything at all in the end for the jury to pass upon. The case in a few words is simply this, that this steamer was insured by these insurance companies; that is all admitted; she was wrecked and she was lost, and claim was made upon the insurance companies to pay under their policies, and they made a denial of that upon the alleged ground that she was unseaworthy, and that the unseaworthiness was the cause of the loss. So far as the issues of fact are concerned I think that will be the only thing that will reach you gentlemen, if indeed that reaches you at all.”

The COURT.—That is the question as to her seaworthiness?

Mr. FRANK.—That will be the only issue of fact, as I view the case, if it becomes an issue of fact at all in the case.

The COURT.—They deny your ownership, I suppose?

Mr. FRANK.—Yes.

Mr. CAMPBELL.—As long as they say they own the vessel, that is all right.

Mr. FRANK.—Here is the bill of sale.

Mr. CAMPBELL.—We will admit that.

Mr. FRANK.—Then the ownership is admitted.

Mr. Frank offered in evidence the insurance policy of the Union Marine Insurance Company, Ltd., in favor of the Sacramento-Stockton Steamship Company. It was received in evidence and marked Plaintiff's Exhibit No. 1 and is hereunto annexed marked Exhibit No. 1.

Mr. Frank then offered in evidence the insurance policy of the Aetna Insurance Company in favor of the Sacramento-Stockton Steamship Company. It was received in evidence and marked Plaintiff's Exhibit No. 2 and is hereunto annexed, marked Exhibit No. 2.

Mr. Frank then offered in evidence the insurance policy of the Hartford Fire Insurance Company in favor of the Sacramento-Stockton Steamship Company. It was received in evidence and marked Plaintiff's Exhibit No. 3 and is hereunto annexed, marked Exhibit No. 3.

Testimony of George Pavesich, for Plaintiff.

GEORGE PAVESICH was then called for plaintiff, was sworn and testified as follows:

I am the master of one of the Red Stack tug-boats, [49] the "Reliance," and was master of her in April, 1915. At that time I was sent up the bay to see what I could do with the steamer "Monarch." I found the "Monarch" off Rodeo, San

(Testimony of George Pavesich.)

Pablo Bay, partly under water. We towed her up Carquinez Straits off Vallejo and beached her there. We got through with her about six o'clock, put an anchor out and fastened two lines, and about eleven o'clock that evening she slid off. We made a search for her next morning. That night we couldn't see anything of her. She slid off and sunk out of sight and that is the last I have ever seen of her.

On cross-examination, Mr. Pavesich testified as follows:

When I first took hold of her she was partially sunk, water-logged, just the top of the upper house was sticking out of water. We took her ashore at the entrance of Napa Creek. She slid off during the night and disappeared. I don't know the exact time we got up to Vallejo but it was somewhere around four, five or six o'clock in the afternoon. I beached her, bow on, and put two lines to her bow and [50] an anchor on the bow on the beach. I remained there with my tug that night, tying close up to one of the Government floats. I couldn't say the exact time, but it must have been somewhere around ten or eleven that I saw her slide off. I had towed her from off Rodeo to the entrance of Napa Creek, a distance of about two miles. I made no soundings to ascertain whether she had drifted away or sunk. I could not see her on the bottom when we looked for her next morning. The water is deep there, about thirteen fathoms. I couldn't see anything of her.

(Testimony of George Pavesich.)

On redirect examination Mr. Pavesich testified as follows:

I have been up and down there ever since that time. I have never seen any sign of her or any wreckage anywhere in the neighborhood. There was nobody on board when she slid off. There were two or three men aboard when I picked her up. My anchor was lost. It was fastened to the stem when I dropped the anchor overboard and it was fastened to the shore. I dropped the anchor ahead of her in the water. I had pulled her on the beach as high as I could and then I put this anchor off my boat and I dropped the anchor to hold it. I can't say whether she parted the line but she took the whole business off when she slid off.

Thereupon the plaintiff rested.

Mr. Campbell then moved for a nonsuit upon the following ground:

"That the plaintiff has not shown a loss which is covered by the policies. As I said before, the policies insure this vessel against loss or damage sustained through collision with another ship or vessel, or with wharves, piers, stages or similar structures, if amounting to \$750, and also insured the vessel against loss or damage caused by fire. Our motion is based [51] upon the ground that there is no proof here of a loss within the perils insured against by the policies."

Thereupon counsel proceeded to argue the motion, at the conclusion of which the Court denied

(Testimony of C. Moltzen.)

the motion for a nonsuit, to which ruling defendants excepted and defendants now assign said exception to said ruling as defendants' Exception No. 1.

Testimony of C. Moltzen, for Defendants.

C. MOLTZEN was then called for the defendants, was sworn and testified as follows:

I am a ship's carpenter and have been engaged in that business for nine years. I was a member of the crew of the "Monarch" at the time she sank in the Sacramento River at Carquinez Straits. I was doing carpenter work on board that vessel.

Mr. CAMPBELL.—Q. Did she fill with water that night while she was going up the river?

Mr. FRANK.—I am perfectly willing that this whole transaction come out, but I am in a position where in order to preserve the attitude which I have been arguing all day that I must object to any evidence upon the part of the defendant regarding the cause of the sinking; I therefore object to it on that ground.

The COURT.—I am inclined to the view, Mr. Campbell, that you are precluded from going into that.

Mr. CAMPBELL.—What is the ground of the objection to the question, please? Do I understand the Court's ruling is that I am now even forbidden to show that there was a loss by unseaworthiness?

The COURT.—Yes.

Mr. FRANK.—Not unseaworthiness — unsea-

(Testimony of C. Moltzen.)

worthiness is [52] another question—yes I also object—

The COURT.—I wondered if you had changed your position. I wanted to hear what your objection was.

Mr. FRANK.—Certainly, because the allegation of the complaint is that it is subject to the law of England and under the law of England there is no warranty of seaworthiness, and they admit that is the law of England in their answer. [53] Under those circumstances the question of unseaworthiness is immaterial.

The COURT.—On what ground?

Mr. FRANK.—Upon the ground that this testimony is immaterial and incompetent under the issues made in this case.

The COURT.—That is the ground, I supposed, you had made before, but it seems you did not. I am inclined to sustain that, Mr. Campbell.

Mr. CAMPBELL.—If your Honor, please, it seems to me that the Court's view is hardly correct for this reason: that in taking the view which you have already expressed on the motion for the nonsuit, we still are in a position where we can show that this vessel was lost by unseaworthiness; but if we show that this vessel was lost by unseaworthiness, it will show that this vessel was not lost by a peril that was insured against in the policy; it may be that under the English law there is no implied warranty of seaworthiness in a time policy; still the fact of that state of the law should not preclude

(Testimony of C. Moltzen.)

me at this time from showing under the pleadings that the cause of this loss was the unseaworthiness of that vessel—that that was not a peril insured against.

The COURT.—It seems to me that in the shape the transaction is disclosed of taken by the pleadings, that that defense is not open to you.

Mr. CAMPBELL.—In the view which your Honor has accepted from Mr. Frank that defense may not be open to me to show that the policy itself was voided by the unseaworthiness.

The COURT.—What is the difference?

Mr. CAMPBELL.—The difference is this, that the policy insured against certain perils and certain perils only. Now, you have said that the burden is not upon these people by denying the nonsuit, to show that that vessel was lost by a peril [54] insured against, but you say because I wrote in my letter that the vessel was lost by unseaworthiness—

The COURT.—Yes.

Mr. CAMPBELL.—If that be true and the argument that counsel made was sound then the only thing that I can show is that vessel was lost by unseaworthiness, and if I do show that vessel was lost by unseaworthiness, then I say I prove that vessel was not lost by a peril insured against because she was only insured against a loss by collision.

Mr. FRANK.—My reply to that is, there is a further issue in the complaint and admitted that there is no warranty of seaworthiness under this

(Testimony of C. Moltzen.)

policy, and if there is no warranty of seaworthiness in this policy it is immaterial whether she is seaworth or unseaworthy.

The COURT.—My ruling on the motion for a nonsuit also included the view that your construction of these policies was untenable. I could not construe the effect of this rider in view of the face of the policies themselves as limiting their scope in the manner that you claim.

The Court thereupon sustained plaintiff's said objection, to which ruling defendants excepted, and defendants now assign said exception to said ruling as Defendants' Exception No. 2.

Mr. CAMPBELL.—I offer to prove by this witness that she did fill with water that night while she was going up the river, and I take an exception to the Court's refusal to let me make that showing.

Mr. CAMPBELL.—Q. Mr. Moltzen, where did the water which filled that vessel as it went up the river that night come into the vessel?

A. Through her seams on the starboard side of the [55] boiler. Those seams opened probably twenty or thirty feet, as far as I could see in the hold. I don't know how fast it filled. When I came down there was a good deal of water in there and I think we ran a half an hour or more before we landed at Selby's. We landed at Selby's about eleven at night. In the morning the "Monarch" was lying on her side. I saw part of her upper works.

Mr. CAMPBELL.—Q. I hand you these two

(Testimony of C. Moltzen.)

photographs and ask you whether or not they show the "Monarch" as she was the morning after she reached the Selby Dock.

A. Yes, I think that is the way she lay down there.

The COURT.—From what point of view, from the dock?

A. From the dock, yes.

The photographs were then marked Defendants' Exhibits "A" and "B" for identification.

A. She turned over on her side about twenty minutes after we reached the dock. We left San Francisco about half past nine from the Washington Street Dock No. 3. We headed for Sacramento, right up the bay. When we discovered this water coming in through the sides we were above Point Pinole. Quite a few seams opened, probably eight or ten. I don't know how much freeboard she had that night.

The COURT.—Was she loaded?

A. Yes, she had freight on.

Q. Stormy? A. Yes.

Mr. CAMPBELL.—What do you mean by saying it was stormy? A. Windy, wind blowing.

Q. Which way was the wind blowing from?

A. Northwest, I think.

The water was running through the seams just like it would through any ordinary crack in the wood. I don't know [56] how rapidly it filled up the vessel. When I got down into the hold I should judge there was about two feet. When we reached

(Testimony of C. Moltzen.)

Selby's it was up to the deck. The hold approximately is about six feet from the deck to her keel.

Mr. CAMPBELL.—Q. What, in your judgment, was the cause of the water entering this vessel through the seams?

Mr. FRANK.—We make our objection on the ground that it is immaterial and incompetent under any of the issues of this case.

The Court thereupon sustained the plaintiff's said objection, to which order defendants excepted and defendants now assign said exception to said ruling as Defendants' Exception No. 3.

Mr. CAMPBELL.—I offer to prove by this witness that in his judgment the cause of the water entering through the seams of that vessel was her unseaworthiness?

Q. How long did you say you had been a ship carpenter? A. Nine years.

Mr. CAMPBELL.—I further offer to prove by this witness on the whole question that the cause of the water entering the ship's seams was not through collision with any ship or vessel, or with any wharf, pier, stage or similar structure, and ask an exception to the Court's refusal to permit me to make that proof.

Mr FRANK.—We object to that line of examination.

The Court thereupon sustained plaintiff's said objection, to which order defendants excepted, and defendants now assign said exception to said ruling as Defendants' Exception No. 4.

(Testimony of C. Moltzen.)

Mr. CAMPBELL.—Q. What can you say as to whether or not the vessel was fully loaded that night? Was she fully loaded when she left San Francisco?

A. No, I don't think so. I think she was loaded to about half a cargo or probably a little more, of her capacity. When she was light her freeboard was twelve inches. I don't [57] know what her freeboard was that night. I don't know what her freeboard was when she was fully loaded. I worked on her off and on at Sacramento, small repairs, and that was the first trip I made on her.

On cross-examination the witness testified as follows:

Mr. FRANK.—Do you know whether or not that vessel had been plying back and forth on that line for some length of time before that time?

Mr. CAMPBELL.—I object to that as being immaterial, irrelevant and incompetent.

Mr. FRANK.—That is to show the vessel is seaworthy. Here she goes on one particular trip—if she had been making that trip for months before, back and forth, and no such accident happened, why, the inference is there is some other cause than unseaworthiness, that must have been the cause of this wrecking. That is the purpose of the question.

Mr. CAMPBELL.—I submit that the proof that she has been engaged on certain business does not prove seaworthiness.

The COURT.—No, it might bear on the question of what brought about her condition at this time.

(Testimony of C. Moltzen.)

The Court thereupon overruled defendants' said objection, to which ruling defendants excepted and defendants now assign said exception to said ruling as Defendants' Exception No. 5.

A. She had been plying back and forth on that line for some length of time before that time.

Mr. FRANK.—Q. Are you familiar with the bay, have you been navigating much upon the bay?

A. Not upon the bay, no.

Q. You don't know, then, about the ordinary and extraordinary condition of weather on the bay.

A. No.

Q. You would not be prepared, then, to say whether [58] or not upon this occasion the weather was ordinary or extraordinary—ordinarily or extraordinarily bad?

A. From what I have seen, it was pretty bad.

Q. It was a bad storm; is that what you mean?

A. Yes.

Mr. CAMPBELL.—How high was the wind blowing, in your judgment?

A. I don't know. I went to bed shortly after we left San Francisco. The chief engineer sent a watchman up to call the second engineer and I slept in the same room as the second engineer, so I dressed and went down with the second engineer at that time and looked at the hold.

Testimony of S. A. Livingston, for Defendants.

Thereafter S. A. LIVINGSTON was called as witness for the defendants and on being sworn testified as follows:

I am the marine underwriter of the Union Marine Insurance Company, one of the defendants in this case. I was in the employ of the Union Marine Insurance Company, at the time the policy of the Union Marine Insurance Company (Plaintiff's Exhibit No. 1) was written.

Mr. CAMPBELL.—Did you at or prior to the time that policy was written have any conversation with Mr. Gormley, the president, and Mr. Cochrane, the manager, of plaintiff corporation as to the risk against which this policy was to cover?

A. I did.

Mr. FRANK.—We object to that on the ground that the policy is the written contract; all previous conversations were merged in it.

The Court thereupon sustained plaintiff's said objection to which order defendants excepted and defendants now assign said exception to said ruling as Defendants' Exception No. 6.

Mr. CAMPBELL.—I offer to prove by this witness that he did have such a conversation. What was said by you and what was said by Mr. Cochrane in such conversation? [59]

Mr. FRANK.—Same objection.

The court thereupon sustained plaintiff's said objection and declined to permit defendants to prove, to which order defendants excepted and defendants

(Testimony of S. A. Livingston.)

now assign said exception to said ruling as defendants' Exception No. 7.

Mr. CAMPBELL.—I offer to prove by this witness that Mr. Cochrane said that the only kind of insurance which they wanted was that covering fire and collision only and that he, Mr. Livingston, the witness, told Mr. Cochrane that the rate for fire and collision insurance only would be 3% whereas if they insured against all risks the premium would be 5% ; that Mr. Cochrane said that the only real risks of loss on the bay were those occasioned by fire and collision and therefore they would not pay more than 3% insurance, covering against fire and collision only.

Mr. FRANK.—We object to any testimony on that line, if your honor please.

The court thereupon sustained plaintiff's said objection, to which order defendants excepted and defendants now assign said exception to said ruling as Defendants' Exception No. 8.

Mr. CAMPBELL.—What is the general understanding among those engaged in marine insurance business and shipping business in San Francisco as to whether or not the rider which is endorsed upon all three of the policies in suit supersedes the terms of the policies and alone defines the risks against which the policy insures.

Mr. FRANK.—We object to that upon the grounds already stated and upon the further ground that the witness is not shown to be competent to testify upon such matters.

(Testimony of S. A. Livingston.)

Mr. CAMPBELL.—How long have you been engaged in the insurance business?

A. I have been engaged ten years.

Q. In San Francisco?

A. In San Francisco. [60]

Mr. CAMPBELL.—I now renew my question, if the court please.

The COURT.—Have you any knowledge upon this subject that the question points to?

A. Yes, I have.

The COURT.—What is your objection?

Mr. FRANK.—We object to it on the ground it is immaterial and incompetent; the same objection that I made before.

The court thereupon sustained plaintiff's said objection, to which order defendants excepted and defendants now assign said exception to said ruling as Defendants' Exception No. 9.

Mr. CAMPBELL.—I offer to prove by this witness that it is the general understanding among those engaged in San Francisco and thereabouts that the rider does supersede the terms of the policy and that the rider alone defines the risk against which the policy insures and I take an exception to the refusal of the court to receive the evidence.

Thereupon Mr. Campbell made the following offer:

Mr. CAMPBELL.—I at this time, if the court please, offer to call as witnesses Mr. Ernest Livingston, assistant general agent and underwriter for the Aetna Insurance Company, one of the defend-

(Testimony of S. A. Livingston.)

ants, and Mr. A. W. Follansbee, the marine underwriter for the Fireman's Fund Insurance Company, now present in Court, and offer to prove by those witnesses that the general understanding among those engaged in the insurance and shipping business in San Francisco and thereabouts is that the rider, such as appears on the policies in suit, supersedes the terms of these policies and alone defines the risks against which the policies insure.

The COURT.—You interpose the same objection?

Mr. FRANK.—Yes. [61]

Thereupon the court sustained plaintiff's said objection to which order defendants excepted and defendants now assign said exception to said ruling as Defendants' Exception No. 10.

Testimony of Charles Bjork, for Defendants.

Thereafter CHARLES BJORK was called by the defendants who on being sworn testified as follows:

I was second mate on the steamer "Monarch" from the 13th to the 15th of April, 1915. I was on deck between the time that the "Monarch" left her wharf at San Francisco and her arrival at the dock at Selby's. I discovered water coming into the steamer on her way up the Bay before she reached Selby's. The water was rising in the bottom of the boat between the timbers. I looked down the hatch into the hold of the vessel.

(Testimony of Charles Bjork.)

Mr. CAMPBELL.—I will ask you whether or not, in your judgment—and do not answer this question until counsel objects, if he does—I will ask you whether or not in your judgment the filling of that steamer with water and her subsequent sinking was caused by her unseaworthiness?

Mr. FRANK.—I certainly object to that as immaterial, irrelevant and incompetent.

Mr. CAMPBELL.—How long have you been engaged in the business of sailing on the river?

A. About ten years.

The court thereupon sustained the plaintiff's said objection to which order defendants excepted and defendants now assign said exception to said ruling as Defendants' Exception No. 11.

Mr. CAMPBELL.—I offer to prove by this witness that in his judgment the filling and sinking of the vessel was caused by unseaworthiness. [62]

Testimony of William Fredericks, for Defendants.

WILLIAM FREDERICKS was then called for the defendants and on being sworn testified as follows:

I took pictures of the steamer "Monarch" the morning after she sank at the Selby Dock. I have films of those photographs.

Mr. CAMPBELL.—It was from these films, if your honor please, I had these enlargements made which have been marked for identification.

Mr. FRANK.—As I understand, you were standing on the dock, right over the vessel—not length-

(Testimony of William Fredericks.)

wise—standing right over the vessel and taking a picture down?

A. I took three or four of the pictures, one lengthwise and one broadside, and different ways.

Mr. FRANK.—At any rate you were standing on the dock with your camera pointing down?

A. Not necessarily.

Q. You were not taking it on a level?

A. One of the pictures I did.

The COURT.—How did you take them? He wants to know from what point of view you took them.

A. There are two views, one lengthwise.

Mr. FRANK.—Where did you stand when you took that?

A. I stood right on the dock.

Q. Then your camera must have been pointing down?

A. No, it was pointing straight out, like that.
[63]

Q. Was it on a level with the dock?

A. Almost; she was tied right beside it.

Q. Does this represent the end of the pile? It does not so appear on the picture.

A. The ship was about four or five feet below the dock.

Mr. CAMPBELL.—You can see the top of the pile there in front.

Thereupon the said photographs were received in evidence and marked Defendants' Exhibits "A" and "B."

Thereupon both parties rested.

Thereafter Mr. Campbell moved the court to instruct the jury to return a verdict in favor of the defendants and each of them upon the ground that there was no substantial evidence and no evidence to show that the steamer "Monarch" sustained loss or damage by fire or through collision with another ship or vessel or with wharves, piers, stages or similar structures.

The Court thereupon refused to give such instruction to the jury to which order the defendants excepted and defendants now assign said exception to said ruling as Defendants' Exception No. 12.

Thereupon the court instructed the jury that the evidence on behalf of the defendants tended to sustain no competent defense to the action and it would be their duty to return a verdict in favor of the plaintiffs against each one of the insurance companies sued, for the amount named in the policies, together with [64] interest from the date of filing suit September 8, 1915, to the date of the verdict at seven per cent per annum. Said date, September 8, 1915, was agreed by counsel for the plaintiff as the date from which said interest should be reckoned.

Thereupon the defendants excepted to the said instructions and defendants now assign said exception to said ruling as Defendants' Exception No. 13.

The court thereupon instructed the jury that in returning their verdict they might give the total amount to be recovered against the defendants without giving the principal and interest separately.

Thereupon the defendants excepted to said ruling and defendants now assign said exception to said ruling as Defendants' Exception No. 14.

Thereupon the defendants in the presence of the jury requested the court to give defendants' Instruction No. 1, reading as follows:

"You are instructed that plaintiff has resting upon it the burden of proving by a fair preponderance of the evidence that the loss of or damage to the steamer 'Monarch,' sued for in this action, was proximately caused by one or more of the perils insured against by all of the policies of insurance issued by the defendants and each of them, which are sued upon herein."

The court thereupon refused to give the said instruction, to which ruling defendants excepted and defendants now assign said exception to said ruling as Defendants' Exception No. 15.

The defendants thereupon requested the court to give defendants' Instruction No. 2 to the jury, reading as follows:

"You are instructed that plaintiff cannot recover in this action against the defendant Aetna Insurance Company unless it shall have shown by a fair preponderance of the evidence that the steamer 'Monarch' was wrecked and totally lost through collision with another ship or vessel or with wharves, piers, stages or similar structures or that it sustained loss or damage caused by [65] fire.

The court thereupon refused to give the said instruction, to which ruling defendants excepted and now assign said exception to said ruling as Defendants' Exception No. 16.

The defendants thereupon requested the court to give to the jury defendants' Instruction No. 3, reading as follows:

"You are instructed that plaintiff cannot recover in this action against the defendant, Aetna Insurance Company, unless it shall have shown by a fair preponderance of the evidence that the steamer 'Monarch' sustained loss or damage through collision with another ship or vessel or with wharves, piers, stages or similar structures and that such damage amounted to \$750, or that it sustained loss or damage caused by fire."

The court thereupon refused to give the said instruction, to which ruling the defendants excepted and now assign said exception to said ruling as Defendants' Exception No. 17.

The defendants thereupon requested that the court give to the jury the defendants' Instruction No. 4, reading as follows:

"You are instructed that plaintiff cannot recover in this action against the defendant, the Union Marine Insurance Company unless it shall have shown by a fair preponderance of the evidence that the steamer 'Monarch' was wrecked or totally lost through collision with another ship or vessel or with wharves, piers,

stages or similar structures or that it sustained loss or damage caused by fire.”

The court thereupon refused to give the said instruction to which ruling defendants excepted and defendants now assign said exception to said ruling as Defendants’ Exception No. 18.

The defendants then requested the court to give to the jury defendants’ Instruction No. 5, reading as follows:

“You are instructed that plaintiff cannot recover in this action against the defendant, The Union Marine Insurance Company unless it shall have shown by a fair preponderance of [66] the evidence that the steamer ‘Monarch’ sustained loss or damage through collision with another ship or vessel or with wharves, piers, stages or similar structures and that such damage amounted to \$750 or that it sustained loss or damage caused by fire.”

The court thereupon refused to give the said instruction to which ruling defendants excepted and defendants now assign said exception to said ruling as Defendants’ Exception No. 19.

The defendants thereupon requested the court to give to the jury defendants’ Instruction No. 6, reading as follows:

“You are instructed that plaintiff cannot recover in this action against the defendant the Hartford Fire Insurance Company unless it shall have shown by a fair preponderance of the evidence that the steamer ‘Monarch’ was

wrecked and totally lost through collision with another ship or vessel or with wharves, piers, stages or similar structures or that it sustained loss or damage caused by fire.”

The court thereupon refused to give the said instruction to which ruling defendants excepted and defendants now assign said exception to said ruling as Defendants’ Exception No. 20.

Thereupon the defendants requested the court to give to the jury defendants’ Instruction No. 7, reading as follows:

“You are instructed that plaintiff cannot recover in this action against the defendant, the Hartford Fire Insurance Company, unless it shall have shown by a fair preponderance of the evidence that the steamer ‘Monarch’ sustained loss or damage through collision with another ship or vessel or with wharves, piers, stages or similar structures and that such damage amounted to \$750 or that it sustained loss or damage caused by fire.”

The court thereupon refused to give the said instruction to which ruling defendants excepted and defendants now assign said exception to said ruling as Defendants’ Exception No. 21. [67]

Thereupon the defendants requested the court to give to the jury defendants’ Instruction No. 8, reading as follows:

“You are instructed that there was under the policies here in suit an implied warranty that the ‘Monarch’ was seaworthy and reasonably

fit, at the commencement of her voyage, to encounter the ordinary perils of the voyage, and if you find, by a fair preponderance of the evidence, that the said steamer was not, at the commencement of her voyage, reasonably fit to encounter the ordinary perils of said voyage, your verdict must be for the defendants.”

The court thereupon refused to give the said instruction to which ruling defendants excepted and defendants now assign said exception to said ruling as Defendants’ Exception No. 22.

Thereupon the defendants requested the court to give to the jury defendants’ Instruction No. 9, reading as follows:

“You are instructed that the policies of insurance issued by defendant, Aetna Insurance Company, sued upon herein, insured plaintiff’s interest in the steamer ‘Monarch’ in the sum of \$10,000, only as follows:

“Loss or damage caused by fire, in accordance with the terms and conditions of the regular California Standard Form of Fire policy as issued by the Aetna Insurance Company of Hartford, Conn.

“Loss or damage done to another ship or vessel through collision in accordance with the terms and conditions of the following collision clause:

“COLLISION CLAUSE:

“And it is further agreed that if the ship hereby insured shall come into collision with

any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision [68] the value of the ship hereby insured, we, the assurers, will pay the assured such proportion of four-fourths of such sum or sums so paid as our subscriptions hereto bear to the value of the ship hereby insured, and in cases in which the liability of the ship has been contested with our consent in writing, we the assurers, will also pay a like proportion of four-fourths of the cost which the assured shall hereby incur or be compelled to pay; but when both vessels are to blame, then, unless the liability of the owners of one or both of such vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the owners of each vessel has been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages, as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision. PROVIDED, always that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay for the removal of obstructions under statutory powers, for injury to harbors, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or en-

gements of the insured vessel, or for loss of life or personal injury.

“AND it is further agreed that the principles involved in this clause shall apply to the case where the vessels are the property in part or in whole of the same owners.

“Loss or damage sustained by the vessel insured through collision with another ship or vessel, or with wharves, piers, stages, or similar structures if amounting to \$750. The cost of repairs of such damage being paid without deduction of one-third new for old.

“This policy also covers while vessel is at wharves or docks, and permission granted to carry passengers, freight, material and [69] supplies incidental to her trade; to make alterations and repairs for a period exceeding 15 consecutive days, and to use kerosene oil, gas, and electricity for lights and crude petroleum for fuel.

“Permitted to tow and to be towed and to assist vessels and/or crafts in all situations.

“Warranted by the assured confined to San Francisco Bay and/or tributaries including Sacramento and/or San Joaquin Rivers, during the currency of this policy.”

The court thereupon refused to give the said instruction to which ruling defendants excepted and defendants now assign said exception to said ruling as Defendants' Exception No. 23.

Thereupon the defendants requested the court to

give to the jury defendants' Instruction No. 10, reading as follows:

“You are instructed that the policies of insurance issued by defendant, The Union Marine Insurance Company, sued upon herein, insured plaintiff's interest in the steamer ‘Monarch’ in the sum of \$3750, only as follows”: (Remaining portion of requested instruction is the same as that embodied in Instruction No. 9.)

The court thereupon refused to give the said instruction to which ruling defendants excepted and defendants now assign said exception to said ruling as Defendants' Exception No. 24.

Thereupon the defendants requested the court to give to the jury defendants' Instruction No. 11, reading as follows:

“You are instructed that the policies of insurance issued by defendant, Hartford Fire Insurance Company, sued upon herein, insured plaintiff's interest in the steamer ‘Monarch’ in the sum of \$6,000, only as follows”: (The remaining portion of the requested instruction is the same as that embodied in Instructions Nos. 9 and 10.)

The court thereupon refused to give the said instruction to which ruling defendants excepted and defendants now assign said exception to said ruling as Defendants' Exception No. 25. [70]

Thereupon the defendants requested the court to give to the jury defendants' Instruction No. 12, reading as follows:

“You are instructed to return a verdict in favor of the defendant, Aetna Insurance Company, for the reason that there is no substantial evidence to sustain a verdict for the plaintiff.”

The court thereupon refused to give the said instruction to which ruling defendants excepted and defendants now assign said exception to said ruling as Defendants' Exception No. 26.

Thereupon the defendants requested the court to give to the jury defendants' Instruction No. 13 reading as follows:

“You are instructed to return a verdict in favor of the defendant, the Union Marine Insurance Company, for the reason that there is no substantial evidence to sustain a verdict for the plaintiff.”

The court thereupon refused to give the said instruction to which ruling defendants excepted and defendants now assign said exception to said ruling as Defendants' Exception No. 27.

Thereupon the defendants requested the court to give to the jury defendants' Instruction No. 14 reading as follows:

“You are instructed to return a verdict in favor of the defendant, the Hartford Fire Insurance Company, for the reason that there is no substantial evidence to sustain a verdict for the plaintiff.”

The court thereupon refused to give the said instruction to which ruling defendants excepted and

defendants now assign said exception to said ruling as Defendants' Exception No. 28.

Thereupon the jury retired and thereafter returned into court with a verdict in favor of the plaintiff and against defendants.

Thereupon defendants took an exception to the verdict of the jury and said defendants now assign said exception as Defendants' Exception No. 29.
[71]

Plaintiff's Exhibit No. 1.

Steamer "MONARCH"

This Policy is to Cover Only as Follows:

Loss or damage caused by fire, in accordance with the terms and conditions of the regular California Standard Form of Fire policy as issued by the Aetna Insurance Company of Hartford, Conn.

Loss or damage done to another ship or vessel through collision in accordance with the terms and conditions of the following collision clause:

COLLISION CLAUSE

And it is further agreed that if the Ship hereby insured shall come into collision with any other Ship or Vessel, and the Assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the Ship hereby insured, we, the Assurers, will pay the Assured such proportion of four-fourths of such sum or sums so paid as our subscriptions hereto bear to the value of the Ship hereby Insured and in cases in which

the liability of the Ship has been contested with our consent in writing, we the Assurers, will also pay a like proportion of four-fourths of the costs which the Assured shall thereby incur or be compelled to pay; but when both Vessels are to blame, then, unless the liability of the Owners of one or both of such Vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the Owners of each Vessel had been compelled to pay to the owners of the other of such Vessels such one-half or other proportion of the latter's damages, as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of such collision.

PROVIDED ALWAYS THAT THIS CLAUSE SHALL IN NO CASE EXTEND TO ANY SUM WHICH THE ASSURED MAY BECOME LIABLE TO PAY, OR SHALL PAY FOR REMOVAL OF OBSTRUCTIONS UNDER STATUTORY POWERS, FOR INJURY TO HARBORS, WHARVES, PIERS, STAGES, AND SIMILAR STRUCTURES, CONSEQUENT ON SUCH COLLISION, OR IN RESPECT OF THE CARGO OR ENGAGEMENTS OF THE INSURED VESSEL, OR FOR LOSS OF LIFE OR PERSONAL INJURY.

And it is further agreed that the principles involved in this clause shall apply to the case where the vessels are the property in part or in whole of the same owners.

Loss or damage sustained by the vessel insured through collision with another ship or vessel, or with wharves, piers, stages, or similar structures if amounting to \$750.00. The cost of repairs of such damage being paid without deduction of one-third new for old.

This policy also covers while vessel is at wharves or docks and permission granted to carry passengers, freight, material and supplies incidental to her trade; to make alterations and repairs for a period exceeding 15 consecutive days, and to use kerosene oil, gas, and electricity for lights and crude petroleum for fuel.

Permitted to tow and to be towed and to assist vessels and/or craft in all situations.

Warranted by the Assured confined to waters of San Francisco Bay and tributaries, including Sacramento and/or San Joaquin Rivers—(Sg.) C. W. H.—during the currency of this policy.

The foregoing clauses are to be regarded as substituted for the terms of the policy to which they are attached, the latter being hereby waived.

Attached to Policy No. 709.

It is agreed that the clauses on slip attached hereto form part of this policy.

No. 709.

HULL TIME.

\$3750.—

THE UNION MARINE INSURANCE COMPANY,
LIMITED.

HEAD OFFICE.

11 Dale Street, Liverpool.

H. R. Robertson,
Chairman,J. Sandeman Allen,
General Manager and Secretary.

PACIFIC COAST BRANCH.

BRANCH OFFICES AT

342 Sansome Street, San Francisco.

W. IRVING, Manager.

R. Gallegos, Asst. Manager.

C. Wm. Henderson, Marine

Underwriter.

London: 1 Threadneedle Street.

Manchester: 47 Spring Gardens.

Glasgow: 22 Royal Exchange Square.

New York: 37 Wall Street.

WHEREAS it hath been proposed to THE UNION MARINE INSURANCE CO., LTD., of Liverpool, by Sacramento-Stockton Steamship Company as well in his or their own name as for and in the name or names of all and every other person or persons to whom the subject matter of this Policy does may or shall appertain in part or in all to make with the said Company the Insurance hereinafter mentioned and described.

NOW THIS POLICY WITNESSETH that in consideration of the said person or persons effecting this Policy promising to pay to the said Company the sum of One hundred twelve and 50/100 Dollars as a premium at and after the rate of three per cent, the said Company takes

upon itself the burthen of such Insurance to the amount
of three thousand seven hundred fifty A (\$3750.—)
and 00/100 Dollars
Dollars

to be insured from July 22d, 1914, noon Pacific
Standard Time, to July 22d, 1915, noon Pacific Standard
Time.

As employment may offer, in port and at sea, in docks Sum Insur
and graving docks, and on the ways, gridirons and \$3750.—
pontoons, at all times, in all places and on all occasions,
services and trades whatsoever and wheresoever, under
steam or sail, upon the Body, Tackle, Apparel, Ordnance,
Munitions, Artillery, Boat and other Furniture of and
in the good Steamer called the "MONARCH" or by
whatsoever other name or names the said ship is or shall
be named or called, beginning the adventure upon the
said ship, &c., as above, and shall so continue and endure
during the period as aforesaid. Should the above ves-
sel be at sea on the expiration of this Policy, it is agreed
to hold her covered until arrival at port of destination
on her being moored therein twenty-four hours in good
safety (provided that before the expiration the Assured
shall have given notice of intention to so continue) at a
pro rata monthly premium, and it shall be lawful for
the said ship, &c., to proceed and sail to and touch and
stay at any Ports or Places whatsoever and wheresoever
without prejudice to this Insurance. The said ship, &c.,
for so much as concerns the assured, by agreement be-
tween the Assured and Assurers in this Policy, are and
shall be valued at as follows:

per cent. Hull, Tackle, Apparel and Furniture, . . . \$
 Machinery and Boilers, \$ \$40,000.—
 Forty thousand Dollars.

TOUCHING the Adventures and Perils which we, the said insurers, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People, of what Nation, Condition or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said ship, &c., or any part thereof.

In case of any Loss or Misfortune, it shall be lawful to the Insured, their Factors, Servants and Assigns, to sue, labor and travel for, in, and about the Defense, Safeguard and recovery of the said ship, &c., or any part thereof, without prejudice to this Insurance; to the charges whereof the said Insurance Company will contribute according to the Rate and Quantity of the sum herein insured. And it is especially declared and agreed that no acts of the Insurer or Insured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

Free from average under Three per cent. unless general or the ship be stranded, sunk or burnt, on fire or in collision with another ship or vessel.

Claims, if any, including claim for constructive total loss, to be adjusted according to English law and practice.

This insurance is understood and agreed to be subject to English law and usage as to liability for and settlement of any and all claims.

With leave to sail with or without Pilots, to tow and assist vessels and craft in all situations, and to be towed and to go on trial trips.

With liberty to discharge, exchange, and take on board goods, specie, passengers and stores, wherever the vessel may call at or proceed to, without being deemed a deviation, and with liberty to carry goods, live cattle, &c., on deck or otherwise, but warranted free from any claim in respect of jettison of cattle or goods carried on deck.

Average payable on each valuation separately, or on the whole. Each voyage to be subject to separate average.

In event of damage, cost of repairs to be paid without deduction of one-third, whether the average be particular or general.

General average payable as per foreign custom if required, or per York-Antwerp Rules, if in accordance with the contract of affreightment.

Warranted free of capture, seizure and detention and the consequences thereof or any attempt thereat, piracy excepted, and also from all consequences of riots and civil commotions, hostilities or warlike operations whether before or after declaration of war.

Warranted free of loss or damage caused by strikers, locked-out workmen or persons taking part in labor disturbances or riots or civil commotions.

IN WITNESS WHEREOF this policy has been signed in San Francisco, State of California, this 25th day July

1914 for and on behalf of the said Company, by virtue of Power of Attorney granted by said Company in that behalf.

(Sg.) C. WM. HENDERSON,
Underwriter. [72]

[Printed in left-hand margin]: It is agreed that the clauses on slip attached hereto form part of this policy. The Union Marine Insurance Co., Ltd.

[Printed in right-hand margin]: This insurance subject to limitations of trade as per slip attached.

[Endorsement]: (English Form) Hull Time. The Union Marine Insurance Co., Ltd., of Liverpool. No. 709. Expires July 22d, 1915. Vessel, S. S. "Monarch." Assured, Sacramento-Stockton S. S. Co. \$3750.— at 3%, \$112.50. W. Irving, Manager Pacific Coast Branch, 343 Sansome St., San Francisco, Cal. (Stamped) H. Stephenson Smith, General Insurance Agent.

[Endorsed]: No. 15930. U. S. Court, Nor. Dist. of Cal. Pltff's Exhibit 1. 6/15/16. M. Clerk.

Plaintiff's Exhibit No. 2.

Steamer "MONARCH"

This Policy is to Cover Only as Follows:

Loss or damage caused by fire, in accordance with the terms and conditions of the regular California Standard Form of Fire policy as issued by the Aetna Insurance Company of Hartford, Conn.

Loss or damage done to another ship or vessel through collision in accordance with the terms and conditions of the following collision clause:

COLLISION CLAUSE

And it is further agreed that if the Ship hereby insured shall come into collision with any other Ship or Vessel, and the Assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the Ship hereby insured, we, the Assurers, will pay the Assured such proportion of four-fourths of such sum or sums so paid as our subscriptions hereto bear to the value of the Ship hereby Insured and in cases in which the liability of the Ship has been contested with our consent in writing, we the Assurers, will also pay a like proportion of four-fourths of the costs which the Assured shall thereby incur or be compelled to pay; but when both Vessels are to blame, then, unless the liability of the Owners of one or both of such Vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the Owners of each Vessel had been compelled to pay to the owners of

the other of such Vessels such one-half or other proportion of the latter's damages, as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of such collision.

PROVIDED ALWAYS THAT THIS CLAUSE SHALL IN NO CASE EXTEND TO ANY SUM WHICH THE ASSURED MAY BECOME LIABLE TO PAY, OR SHALL PAY FOR REMOVAL OF OBSTRUCTIONS UNDER STATUTORY POWERS, FOR INJURY TO HARBORS, WHARVES, PIERS, STAGES, AND SIMILAR STRUCTURES, CONSEQUENT ON SUCH COLLISION, OR IN RESPECT OF THE CARGO OR ENGAGEMENTS OF THE INSURED VESSEL, OR FOR LOSS OF LIFE OR PERSONAL INJURY.

And it is further agreed that the principles involved in this clause shall apply to the case where the vessels are the property in part or in whole of the same owners.

Loss or damage sustained by the vessel insured through collision with another ship or vessel, or with wharves, piers, stages, or similar structures if amounting to \$750.— The cost of repairs of such damage being paid without deduction of one-third new for old.

This policy also covers while vessel is at wharves or docks and permission granted to carry passengers, freight, material and supplies incidental to her trade; to make alterations and repairs for a period exceeding 15 consecutive days, and to use kerosene oil, gas, and electricity for lights and crude petroleum for fuel.

Permitted to tow and to be towed and to assist vessels and/or craft in all situations.

Warranted by the Assured confined to San Francisco Bay and/or tributaries including Sacramento and/or San Joaquin Rivers during the currency of this policy.

The foregoing clauses are to be regarded as substituted for the terms of the policy to which they are attached, the latter being hereby waived.

Attached to Policy No. 3563.

AETNA INSURANCE CO.

J. A. W.

[Printed in left-hand margin]: Subject to limitations of trade as specified in slip attached to this policy. J. A. W.

It is agreed that clauses on slip attached hereto form part of this policy. J. A. W.

Duplicate J. A. W.

MARINE DEPARTMENT
AETNA INSURANCE COMPANY.

Hartford, Connecticut.

Incorporated, 1819.

Cash Capital \$5,000,000

Pacific Branch, San Francisco, California.

SACRAMENTO-STOCKTON STEAMSHIP CO.

On account of concerned.

In case of loss, to be paid in funds current in the United States to Assured, or order,

Does make Insurance and cause TEN THOUSAND DOLLARS,

To be insured from July 22d, 1914 at Noon, Pacific Standard Time to July 22d, 1915 Noon, Pacific Standard Time.

As employment may offer, in port and at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places and on all occasions, services and trades whatsoever and wheresoever, under steam or sail, upon the Body, Tackle, Apparel, Ordnance, Munitions, Artillery, Boat and other Furniture of and in the good Steamer called the "MONARCH" or by whatsoever other name or names the said ship is or shall be named or called, beginning the adventure upon the said ship, &c., as above, and shall so continue and endure during the period as aforesaid. Should the above vessel be at sea on the expiration of this Policy, it is agreed to hold her covered until arrival at port of destination on her being moored therein twenty-four hours in good safety (provided that before the expiration the Assured shall have given notice of intention to so continue) at a

pro rata monthly premium, and it shall be lawful for the said ship, &c., to proceed and sail to and touch and stay at any Ports or Places whatsoever and wheresoever without prejudice to this Insurance. The said ship, &c., for so much as concerns the assured, by agreement between the Assured and Assurers in this Policy, are and shall be valued at as follows:

Hull, Tackle, Apparel and Furniture,....\$....
Machinery and Boilers,.....\$....\$40,000.— Rate per cent.
FORTY THOUSANDDOLLARS. 3.

TOUCHING the Adventures and Perils which we, the said insurers, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People, of what Nation, Condition or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said ship, &c., or any part thereof; and in case of any Loss or Misfortune it shall be lawful to the Insured, their Factors, Servants and Assigns, to sue, labor and travel for, in, and about the Defense, Safeguard and Recovery of the said Ship, &c., or any part thereof, without prejudice to this Insurance; to the charges whereof the said Insurance Company will contribute according to the Rate and Quantity of the sum herein insured. [Written across face of canceled matter: Void. J. A. W.] And it is specially declared and agreed that no acts of the Insurer or Insured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandon-

ment; having been paid the consideration for this Insurance, by the Insured or his or their Assigns, at and after the rate of 3 per cent., to return per cent. for every 30 consecutive days the vessel may be laid up in port, or in dock; during such period the vessel being at the risk of the Insurers—to return *pro rata* premium for every 30 days of unexpired time, if this Policy be canceled and arrival.

Free from average under Three per cent unless general or the ship be stranded, sunk or burnt, on fire or in collision with another ship or vessel.

[Written across face of canceled matter: Void. J. A. W.]

Claims, if any, including claim for constructive total loss, to be adjusted according to English law and practice.

With leave to sail with or without Pilots, to tow and assist vessels and craft in all situations, and to be towed and to go on trial trips.

With liberty to discharge, exchange, and take on board goods, specie, passengers and stores, wherever the vessel may call at or proceed to, without being deemed a deviation, and with liberty to carry goods, live cattle, &c., on deck or otherwise, but warranted free from any claim in respect of jettison of cattle or goods carried on deck. Average payable on each valuation separately, or on the whole. Each voyage to be subject to separate average. In event of damage, cost of repairs to be paid without deduction of one-third, whether the average be particular or general. General average payable as per foreign custom if required, or per York-Antwerp Rules, if in accordance with the contract of affreightment.

It is agreed, that if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay any sums not exceeding the value of the ship hereby insured, in respect of injury to such other ship or vessel, itself, or to the goods and effects on board thereof, or for loss of freight then being earned upon such goods by such other ship or vessel, the INSURERS will pay the Insured such proportion of three-fourths parts of said sums as the amount hereby insured bears to the value of the ship hereby insured. But this agreement is in no case to be construed as extending to any sums which the Insured may become liable to pay, or shall pay in respect of loss of life or personal injury to individuals, from any cause whatever.

Provided always that this clause shall in no case extend to any sum which the Assured may become liable to pay, or shall pay, for the removal of obstructions under statutory powers, for injury to harbors, wharves, piers, stages and similar structures consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury.

[Written across face of canceled matter: Void J. A. W.]

It is agreed that any change of interest in the vessel hereby insured shall not affect the validity of this Policy.

If there be an Agent of the INSURERS located at or near any place where repairs are made, or proofs of loss or average taken, said Agent must be represented on the surveys, if any be held, and all bills for repairs, or proofs of loss or average, must be certified to by him, or they will not be allowed by this Company.

IN WITNESS WHEREOF, the said AETNA INSURANCE COMPANY, has caused this Policy to be signed by its President, and attested by its Marine Secretary, at its office in the City of Hartford, and State of Connecticut, and this Policy is made and accepted upon the above expressed conditions, but shall not be valid unless countersigned by the duly authorized Agents of the Company.

Countersigned at San Francisco Cal., this 22d day of July, 1914.

WM. K. CLARK,
President.

W. F. WHITTELSEY,
Marine Secretary.

E. S. LIVINGSTON,
Asst. Gen'l Agent. [73]

[Printed in right-hand margin]: Warranted free from capture, seizure and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities or warlike operations, whether before or after declaration of war.

[Endorsement]: Hull Time. English Form. No. 3563. Expires, July 22d, 1915. Vessel, S. S. "Monarch." Assured, Sacramento-Stockton Steamship Company. Aetna Insurance Company, Hartford, Connecticut, Marine Department, 301 California Street, San Francisco, Cal. \$10,000.— at 3%, \$300.—. (Stamped) H. Stephenson Smith, General Insurance Agent. (Edition May, 1911)—3-'12—1 M.

[Endorsed]: No. 15930. U. S. Court, Nor. Dist. of Cal. Pltff's. Exhibit 2. 6/15/16. M. Clerk.

Plaintiff's Exhibit No. 3.

SAMPLE COPY.

Steamer "MONARCH"

This Policy is to Cover Only as Follows:

Loss or damage caused by fire, in accordance with the terms and conditions of the regular California Standard Form of Fire policy as issued by the Hartford Fire Insurance Company of Hartford, Connecticut.

Loss or damage done to another ship or vessel through collision in accordance with the terms and conditions of the following collision clause:

COLLISION CLAUSE.

And it is further agreed that if the Ship hereby insured shall come into collision with any other Ship or Vessel, and the Assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the Ship hereby insured, we, the Assurers, will pay the Assured such proportion of four-fourths of such sum or sums so paid as our subscriptions hereto bear to the value of the Ship hereby Insured and in cases in which the liability of the Ship has been contested with our consent in writing, we the Assurers, will also pay a like proportion of four-fourths of the costs which the Assured shall thereby incur or be compelled to pay; but when both Vessels are to blame, then, unless the liability of the Owners of one or both of such Vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the Owners of

each Vessel had been compelled to pay to the owners of the other of such Vessels such one-half or other proportion of the latter's damages, as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of such collision.

PROVIDED ALWAYS THAT THIS CLAUSE SHALL IN NO CASE EXTEND TO ANY SUM WHICH THE ASSURED MAY BECOME LIABLE TO PAY, OR SHALL PAY FOR REMOVAL OF OBSTRUCTIONS UNDER STATUTORY POWERS, FOR INJURY TO HARBORS, WHARVES, PIERS, STAGES, AND SIMILAR STRUCTURES, CONSEQUENT ON SUCH COLLISION, OR IN RESPECT OF THE CARGO OR ENGAGEMENTS OF THE INSURED VESSEL, OR FOR LOSS OF LIFE OR PERSONAL INJURY.

And it is further agreed that the principles involved in this clause shall apply to the case where the vessels are the property in part or in whole of the same owners.

Loss or damage sustained by the vessel insured through collision with another ship or vessel, or with wharves, piers, stages, or similar structures if amounting to \$750.00. The cost of repairs of such damage being paid without deduction of one-third new for old.

This policy also covers while vessel is at wharves or docks and permission granted to carry passengers, freight, material and supplies incidental to her trade; to make alterations and repairs for a period exceeding 15 consecutive days, and to use kerosene oil, gas, and electricity for lights and crude petroleum for fuel.

Permitted to tow and to be towed and to assist vessels and/or craft in all situations.

Warranted by the Assured confined to waters of San Francisco Bay and tributaries, including Sacramento and/or San Joaquin Rivers during the currency of this policy.

The foregoing clauses are to be regarded as substituted for the terms of the policy to which they are attached, the latter being hereby waived.

Attached to Policy No. 4035.

(Sg.) DIXWELL HEWITT,

General Manager.

MARINE DEPARTMENT

HARTFORD FIRE INSURANCE COMPANY

Hartford, Connecticut.

SACRAMENTO-STOCKTON STEAMSHIP CO.

On account of whom concerned.

No. In case of loss, to be paid in funds current in the United states to them or order.

Does make Insurance and cause Six thousand and 00/100 Dollars,

To be insured at and from the 22d day of July, 1914, noon, Pacific Standard Time, to the 22d day of July, 1915, noon, Pacific Standard Time.

Insured, 0.00 As employment may offer, in port and at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places and on all occasions, services and trades whatsoever and wheresoever, under steam or sail, upon the Body, Tackle, Apparel, Ordnance, Munitions, Artillery, Boat and other Furniture of and in the good Steamer called the "MONARCH" or by whatsoever other name or names the said ship is or shall be named or called, beginning the adventure upon the said ship, &c., as above, and shall so continue and endure during the period as aforesaid. Should the above vessel be at sea on the expiration of this Policy, it is agreed to hold her covered until arrival at port of destination on her being moored therein twenty-four hours in good safety (provided that before the expiration the Assured shall have given notice of intention to so continue) at a *pro rata* monthly premium, and it shall be lawful for the said ship, &c., to proceed and sail to and touch and

stay at any Ports or Places whatsoever and wheresoever without prejudice to this Insurance. The said ship, &c., for so much as concerns the assured, by agreement between the Assured and Assurers in this Policy, are and shall be valued at as follows:

Hull, Tackle, Apparel and Furniture,....\$....

Machinery and Boilers,.....\$....\$40,000.00 Rate per cent.,

Forty thousand and 00/100.....DOLLARS. 3.

TOUCHING the Adventures and Perils which we, the said insurers, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People, of what Nation, Condition or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said ship, &c., or any part thereof; and in case of any Loss or Misfortune it shall be lawful to the Insured, their Factors, Servants and Assigns, to sue, labor and travel for, in, and about the Defense, Safeguard and Recovery of the said Ship, &c., or any part thereof, without prejudice to this Insurance; to the charges whereof the said Insurance Company will contribute according to the Rate and Quantity of the sum herein insured. And it is specially declared and agreed that no acts of the Insurer or Insured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment; having been paid the consideration for this Insurance, by the Insured or his or their Assigns, at and

after the rate of three per cent., to return per cent. for every 30 consecutive days the vessel may be laid up in port, or in dock; during such period the vessel being at the risk of the Insurers—to return *pro rata* premium for every 30 days of unexpired time, if this Policy be canceled and arrival.

Free from average under Three per cent. unless general or the ship be stranded, sunk or burnt, on fire or in collision with another ship or vessel.

Claims, if any, including claim for constructive total loss, to be adjusted according to English law and practice.

With leave to sail with or without Pilots, to tow and assist vessels and craft in all situations, and to be towed and to go on trial trips.

With liberty to discharge, exchange, and take on board goods, specie, passengers and stores, wherever the vessel may call at or proceed to, without being deemed a deviation, and with liberty to carry goods, live cattle, &c., on deck or otherwise, but warranted free from any claim in respect of jettison of cattle or goods carried on deck. Average payable on each valuation separately, or on the whole. Each voyage to be subject to separate average. In event of damage, cost of repairs to be paid without deduction of one-third, whether the average be particular or general. General average payable as per foreign custom if required, or per York-Antwerp Rules, if in accordance with the contract of affreightment.

It is agreed, that if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay any sums not exceeding the value of the ship hereby insured, in respect of injury to such other

ship or vessel, itself, or to the goods and effects on board thereof, or for loss of freight then being earned upon such goods by such other ship or vessel, the INSURERS will pay the Insured such proportion of three-fourths parts of said sums as the amount hereby insured bears to the value of the ship hereby insured. But this agreement is in no case to be construed as extending to any sums which the Insured may become liable to pay, or shall pay in respect of loss of life or personal injury to individuals, from any cause whatever.

Provided always that this clause shall in no case extend to any sum which the Assured may become liable to pay, or shall pay for the removal of obstructions under statutory powers, for injury to harbors, wharves, piers, stages and similar structures consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury.

It is agreed that any change of interest in the vessel hereby insured shall not affect the validity of this Policy.

If there be an Agent of the INSURERS located at or near any place where repairs are made, or proofs of loss or average taken, said Agent must be represented on the surveys, if any be held, and all bills for repairs, or proofs of loss or average, must be certified to by him, or they will not be allowed by this Company.

IN WITNESS WHEREOF, this company has executed and attested these presents, this 22d day of July, 1914. This policy shall not be valid until countersigned by the

It is a condition of this policy that any broker, person, firm, or corporation who shall procure this insurance to be taken by this company shall be deemed to be exclusively the agent of the insured and all transactions and representations relating to this insurance

duly authorized general agent of the company at Hart-
ford, Conn. San
Francisco, Cal.

FRED'K SAMSON,

Secretary.

R. M. BISSELL,

President.

Countersigned by

DIXWELL HEWITT,

General Agent. [74]

[Printed in right-hand margin]: Warranted free from capture, seizure and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities or warlike operations, whether before or after declaration of war.

[Endorsement]: Hull Time. English Form. Issued to Sacramento-Stockton Steamship Co. Amount Insured, \$6,000.00. Rate, 3%. Premium, \$180.00. Expires, July 22, 1915. No. 40035. Vessel Valued "Monarch." Marine and Transportation Department. Hartford Fire Insurance Company, Hartford, Conn. San Francisco Agency, 441 California Street. H. Stephenson Smith, General Insurance Agent. 5c 2-14-1914. Edition Jan. 1914. No. 287.

[Endorsed]: No. 15930. U. S. Court, Nor. Dist. of Cal. Pltff's. Exhibit 3. 6/15/16. M., Clerk.

That thereafter defendants filed a petition for a new trial which was denied on the 1st day of March, 1920; that the court, during the pendency of said petition for a new trial, with the consent of plaintiff, extended defendants' time within which to propose a bill of exceptions herein; that during the pendency of said petition for a new trial the power of the court to settle this bill of exceptions has been by stipulation and order of court continued from term to term; that defendants' proposed bill of exceptions was within the time allowed by law, to wit: on the thirtieth day of March, 1920, duly served upon plaintiff; that on April 9, 1920, and at successive intervals thereafter plaintiff has with the consent of defendants obtained extensions of time to propose amendments to said proposed bill to and including October 26th, 1920; that with the consent of the parties duly given, the power of the court to settle this engrossed bill has, during all of said time, been continued from term to term to and including the present term in which it is now settled.

The foregoing constitutes all of the proceedings and all of the evidence offered and received on the trial of said action, and now, within the time required by law and the rules of this court, said defendants propose the foregoing as and for their bill of exceptions to the rulings of the court made during the trial of the above entitled action and to the decision of the said court and the verdict of said jury and prays

that it may be settled and allowed as correct.

McCUTCHEN, OLNEY & WILLARD,
McCUTCHEN, WILLARD, MANNON
& GREENE,

Attorneys for Defendants. [75]

**Stipulation as to the Correctness of the Bill of Ex-
ceptions.**

IT IS HEREBY STIPULATED AND AGREED that the above and foregoing constitutes a true and correct bill of exceptions in the above-entitled action, and that the same contains all of the proceedings had and all of the evidence offered and received on the trial of said action and all of the rulings of the court made during the trial of said action, and that the same may be now settled and allowed as and for the bill of exceptions to such rulings, and to the decision of the court herein.

Dated, San Francisco, California, this 26th day of October, 1920.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Plaintiff.

McCUTCHEN, OLNEY & WILLARD,
McCUTCHEN, WILLARD, MANNON
& GREENE,

Attorneys for Defendants.

It appearing to the satisfaction of the undersigned judge of the above-entitled court that the judge before whom the above-entitled cause was tried, to wit, the Honorable Wm. C. Van Fleet, is, by reason of

disability due to sickness, unable to consider, allow and sign the foregoing bill of exceptions;

NOW, THEREFORE, the undersigned, being a judge of the court in which the cause was tried and holding such court, hereby certifies that the said bill of exceptions contains all of the proceedings had and all of the evidence offered and received on the trial of the above-entitled action and all of the rulings of the court made during said trial and all of the exceptions of the respective parties thereto, and that said bill is in proper form and conforms to the truth, and the same is hereby allowed and [76] signed as the true bill of exceptions herein.

R. S. BEAN,
District Judge.

October 26, 1920.

Receipt of a copy of the within bill of exceptions is hereby admitted this 30th day of March, 1920.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 26, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [77]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,930.

SACRAMENTO – STOCKTON STEAMSHIP
COMPANY, a Corporation,
Plaintiff,

vs.

AETNA INSURANCE COMPANY, a Corporation,
UNION MARINE INSURANCE COMPANY, a Corporation, and HARTFORD
FIRE INSURANCE COMPANY, a Corporation,

Defendants and Petitioners.

Petition for Allowance of Writ of Error.

Aetna Insurance Company, a corporation, Union Marine Insurance Company, a corporation, and Hartford Fire Insurance Company, a corporation, defendants in the above-entitled cause, feeling themselves aggrieved by the decision of the court in the judgment entered therein on the 16th day of June, 1916, come now by Messrs. McCutchen, Willard, Mannon & Greene, their attorneys, and petition said court for an order allowing said defendants to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals, for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security

which the said defendants shall give and furnish upon said writ of error and that upon the giving of such security [78] all further proceedings in this court be suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals, for the Ninth Circuit.

EDWARD J. McCUTCHEN,
McCUTCHEN, WILLARD, MANNON
& GREENE,

Attorneys for Defendants and Petitioners.

[Endorsed]: Filed May 8, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [79]

In the District Court of the United States in and
for the Northern District of California, Second
Division.

No. 15,930.

SACRAMENTO – STOCKTON STEAMSHIP
COMPANY, a Corporation,
Plaintiff,

vs.

THE AETNA INSURANCE COMPANY, a Corpo-
ration, THE UNION MARINE INSUR-
ANCE COMPANY, LIMITED, a Corpora-
tion, THE HARTFORD FIRE INSUR-
ANCE COMPANY, a Corporation,
Defendants and Petitioners.

Assignment of Errors.

Now come The Aetna Insurance Company, a cor-

poration, The Union Marine Insurance Company, Limited, a corporation, and The Hartford Fire Insurance Company, a corporation, petitioners and defendants herein, and make and file the following assignment or errors upon which they will rely in the prosecution of their writ of error in the above-entitled cause:

I.

The above-entitled court erred in holding and determining that plaintiff was entitled to judgment against defendant The Aetna Insurance Company, a corporation, in the sum of ten thousand five hundred and forty-six and $38/100$ (10,546.38) dollars, together with interest thereon, and against The Union [80] Marine Insurance Company, Limited, a corporation, in the sum of three thousand nine hundred fifty-four and $90/100$ (3,954.90) dollars, together with interest thereon, and The Hartford Fire Insurance Company, a corporation, in the sum of six thousand three hundred and twenty-seven and $83/100$ (6,327.83) dollars, together with interest thereon.

II.

The court erred in holding and deciding that the plaintiff was entitled to judgment against defendants inasmuch as the evidence did not show, and there was no evidence to show, by what peril or perils said steamer "Monarch" was wrecked and lost or what was the cause of her wrecking and loss.

III.

The court erred in holding and deciding that the plaintiff was entitled to said judgment, inasmuch

as the evidence did not show and there was no evidence to show that the steamer "Monarch" was wrecked and totally lost or wrecked or totally lost, or wrecked or lost at all, by a peril or any of the perils named in the policies issued by these defendants, and each of them, and sued upon herein.

IV.

The court erred in holding and deciding that the plaintiff was entitled to said judgment, inasmuch as the evidence did not show and there was no evidence to show that said steamer "Monarch" was lost by fire or through collision with another ship or vessel, or with wharves, piers, stages or similar structures. [81]

V.

The court erred in holding and deciding that the plaintiff was entitled to said judgment, inasmuch as the evidence did not show and there was no evidence to show that said steamer "Monarch" was lost or sustained damage through collision with another ship or vessel or with wharves, piers, stages or similar structures to the amount of seven hundred and fifty (750) dollars or more.

VI.

That the court erred in holding and deciding that the plaintiff was entitled to said judgment, inasmuch as the evidence did not show and there was no evidence to show that any notice or notices of abandonment of said steamer "Monarch" was or were served upon these defendants or any of them with reasonable diligence.

VII.

The court erred in holding and deciding that plaintiff was entitled to said judgment, inasmuch as the purported notices of abandonment pleaded in the complaint were insufficient and not explicit, and did not specify the particular cause of the alleged abandonment, as required by the law applicable in the premises.

VIII.

The court erred in holding and determining that under the refusal of these defendants and each of them to accept the proffered abandonment of said steamer "Monarch" the only defense available to defendants and each of them was the unseaworthiness of the said steamer "Monarch," all other defenses being abandoned and waived, and that under the [82] policies in suit unseaworthiness was not in turn a defense.

IX.

The court erred in holding and determining that these defendants and each of them were not entitled to show and offer evidence of the cause of the loss of said steamer "Monarch" and that such cause of loss was not covered by the policies in suit.

X.

The court erred in declining and refusing to permit these defendants and each of them to show that unseaworthiness was the cause of the loss of said steamer "Monarch."

XI.

The court erred in holding and determining that it was not requisite for plaintiff, in order that it might

recover in this action, to prove the allegation of its complaint that the said steamer was wrecked and totally lost by perils named in and insured against by the policies in suit.

XII.

The court erred in holding and determining that it was not requisite for plaintiff, in order to recover in this action, to show what was the cause of the loss of the said steamer "Monarch."

XIII.

The court erred in holding and determining that it was not requisite for plaintiff, in order to recover in this action, to show that the steamer "Monarch" was lost by a peril named in the riders attached to the policies in suit. [83]

XIV.

The Court erred in holding and determining that it was not requisite for plaintiff, in order to recover in this action, to show that the said steamer "Monarch" was lost by a peril named, either in the riders attached to the policies in suit, or anywhere at all in said policies.

XV.

The Court erred in holding and determining that the perils or causes of loss named in the riders attached to the policies in suit were not the only perils or causes of loss covered by said policies and each of them.

XVI.

The Court erred in holding and determining that the only perils or causes of loss named in the body

of the policy of The Aetna Insurance Company, sued on herein, which were canceled by the rider attached to said policy, were the perils or causes of loss that were deleted in the said body of the policy, to wit, the fire and collision causes so deleted.

XVII.

The Court erred in holding and determining that the policy of The Aetna Insurance Company sued on herein covered perils and causes of loss other than those named in the rider attached to said policy, to wit, in addition to the causes and perils of loss named in said rider, all the perils and causes of loss named in the body of the policy and not deleted therefrom. [84]

XVIII.

The Court erred in holding and determining that the riders attached to the policies in suit replaced only the corresponding clauses of the main body of the policies, to wit, the fire and collision clauses thereof.

XIX.

The Court erred in holding and determining that by reason of the clause stamped across the margins of the policies in suit, to wit, the clause,

“It is agreed that clause on slip attached hereto form a part of this policy,”

that the riders attached to said policies did not specify the only perils or causes of loss insured against by the policies in suit and each of them.

XX.

The Court erred in holding and determining that by reason of the foregoing marginal clauses in each

of said policies, and/or by reason of the express deleting of certain clauses in the main body of the policy of the Aetna Insurance Company, and/or on account of any reason or reasons whatsoever, the perils or causes of loss named in the riders attached to the policies in suit were not the only causes of perils insured against by said policies.

XXI.

The Court erred in refusing and declining to permit the witness, S. A. Livingston, to answer the question whether prior to the time that the policies in suit were written he had any conversation with the president and the manager of plaintiff corporation concerning the risk or risks [85] against which the said policies and each of them were intended to cover.

XXII.

The Court erred in refusing and declining to permit counsel for defendants to show by said witness what was said by the witness and by the president and the manager of plaintiff corporation in said conversation.

XXIII.

The Court erred in refusing and declining to permit counsel for defendants to prove by the said witness S. A. Livingston that the manager of the plaintiff corporation said to the said S. A. Livingston that the only kind of insurance which plaintiff wanted was that covering against fire and collision and that he, the said Livingston, told the said manager that the rate for fire and collision insurance only would be three per cent whereas if plaintiff

insured against all risks the premium would be five per cent and that the said manager said that the only real risks of loss on San Francisco Bay were those occasioned by fire and collision and that therefore plaintiff would not pay more than three per cent covering against fire and collision only.

XXIV.

The Court erred in refusing and declining to permit counsel for defendants to show by witness S. A. Livingston that it was the general understanding among those engaged in the insurance business and in the shipping business in San Francisco and thereabouts that the riders attached to the policies in suit and each of them superseded the terms of the said policies and that said riders alone defined the risks [86] against which the said policies insure.

XXV.

The Court erred in refusing and declining to receive evidence from Mr. Ernest Livingston, assistant general agent and underwriter for the Aetna Insurance Company, one of the defendants, and from Mr. A. W. Follansbee, marine underwriter for the Firemen's Fund Insurance Company, both of whom were present in court and ready to testify and both of whom were offered by defendants as witnesses, that the general understanding among those engaged in the insurance and shipping business in San Francisco and thereabouts is that a rider such as that appearing upon the policies in suit supersedes the terms of said policies

and alone defines the risks against which the said policies insure.

XXVI.

The Court erred in holding and determining that any and all the terms or any of the terms of the policies of insurance issued by these defendants and sued upon herein provided that the liability of said defendants under their respective policies, including the liability for destruction, total loss or otherwise, was to be determined according to English law and practice.

XXVII.

The Court erred in denying defendants' motion for a nonsuit made at the close of plaintiff's case in chief and based upon the ground that plaintiff had not shown a loss which was covered by the policy, which said motion is set forth [87] in Defendants' Exception No. 1.

XXVIII.

The Court erred in denying defendants' motion, made at the conclusion of all of the evidence, for an instruction to the jury to return a verdict in favor of the defendants upon the ground that there was no substantial evidence and no evidence to show that the steamer "Monarch" sustained loss or damage by fire or through collision with another ship or vessel or with wharves, piers, stages or similar structures.

XXIX.

The Court erred in holding that there was no issue of fact to submit to the jury and in refusing to submit any issue of fact to the jury.

XXX.

The Court erred in holding that there was no issue of fact as to the cause of the loss of the steamer "Monarch" to submit to the jury and in refusing to submit to the jury the question whether the cause of the loss of the steamer "Monarch" was her own unseaworthiness.

XXXI.

The Court erred in not submitting to the jury the question as to whether the "Monarch" was lost or wrecked by any one of the perils insured against by the policies of insurance issued by said defendants.

XXXII.

The Court erred in instructing the jury that the evidence on behalf of the defendants tended to sustain no competent defense to the action and in instructing the jury that it was its duty to return a verdict in this case in favor of the plaintiff and against these defendants for the amount named in the policy issued by each of the said defendants sued herein, together with interest thereon from the 28th day of September, 1915, to the date of the verdict at the rate of seven per cent and in instructing the jury to return a verdict in favor of the plaintiff and against these defendants at all.

[88]

XXXIII.

The Court erred in sustaining plaintiff's objection to the following question propounded to the witness, C. Moltzen, as shown by Plaintiff's Exception No. 2, as follows:

“Q. Did she fill with water that night while she was going up the river?”

XXXIV.

The Court erred in sustaining plaintiff's objection to a question propounded to the witness, C. Moltzen, as shown by defendants' Exception No. 3, as follows:

“Mr. CAMPBELL.—What, in your judgment was the cause of the water entering this vessel through the seams?”

XXXV.

The Court erred in refusing and declining to permit counsel for defendants to show by witness C. Moltzen the cause of the sinking of the vessel, as shown by Defendants' Exception No. 4, as follows:

“Mr. CAMPBELL.—I offer to prove by this witness that in his judgment the cause of the water entering through the seams of that vessel was her unseaworthiness. I further offer to prove on the whole question that the cause of the water entering the ship's seams was not through collision with any ship or vessel or with any wharf, pier, stage or similar structure.”

XXXVI.

The Court erred in overruling defendants' objection to the following question propounded to the witness, C. Moltzen, as shown by defendants' exception No. 5, as follows:

“Do you know whether or not that vessel had been plying back and forth on that line

for some length of time [89] before that time?"

XXXVII.

The Court erred in sustaining plaintiff's objection to the following question propounded to the witness, S. A. Livingston, as shown by plaintiff's exception No. 6, as follows:

"Did you, at or prior to the time that that policy was written, have any conversation with Mr. Gormley, the president, and Mr. Cochrane, the manager, of plaintiff corporation as to the risk against which the policy was to cover?"

XXXVIII.

The Court erred in refusing and declining to permit counsel for defendants to show what were the risks intended to be covered and what was the kind of insurance desired by plaintiff corporation, as shown by defendants' exception No. 8, as follows:

"Mr. CAMPBELL.—I offer to prove by this witness that Mr. Cochrane said that the only kind of insurance which they wanted was that covering fire and collision only, and that he, Mr. Livingston, the witness, told Mr. Cochrane that the rate for fire and collision insurance only would be 3 per cent, whereas if they insured against all risks the premium would be 5 per cent, but Mr. Cochrane said that the only real risks of loss on the bay were those occasioned by fire and collision and therefore they

would not pay more than 3 per cent covering against fire and collision only.”

XXXIX.

The Court erred in sustaining plaintiff's objection to the following question propounded to the witness, S. A. Livingston, [90] as shown by defendants' exception No. 9, as follows:

“What is the general understanding among those engaged in marine insurance business and shipping business in San Francisco as to whether or not the rider which is endorsed upon all three of the policies in suit supersedes the terms of the policy and alone defines the risks against which the policy insures?”

XL.

The Court erred in refusing and declining to receive the following evidence of Mr. Ernest Livingston and Mr. A. W. Follansbee, as shown by defendants, exception No. 10, as follows:

“That the general understanding among those engaging in the insurance and shipping business in San Francisco and thereabouts is that the rider, such as appears on the policies in suit, supersedes the terms of these policies and alone defines the risks against which the policies insure.”

XLI.

The Court erred in sustaining plaintiff's objection to the following question propounded to the witness, Charles Bjork, as shown by defendants' exception No. 11, as follows:

“I will ask you whether or not in your judgment—and do not answer this question until counsel objects—if he does—I will ask you whether or not in your judgment the filling of that steamer with water and her subsequent sinking was caused by her unseaworthiness?”

XLII.

The Court erred in declining and refusing the defendants' motion to instruct the jury to return a verdict in [91] favor of the defendants and each of them upon the ground that there was no substantial evidence and no evidence to show that the steamer “Monarch” sustained loss or damage by fire or through collision with another ship or vessel, or with wharves, piers, stages or similar structures, which said request to so instruct the jury is set forth in Defendants' Exception No. 12.

XLIII.

The Court erred in instructing the jury that the evidence on behalf of the defendants tended to sustain no competent defense to the action and that it would be their duty to return a verdict in favor of the plaintiffs against each one of the insurance companies sued for the amount named in the policies, together with interest from the date of filing suit, September 8, 1915, to the date of the verdict, at seven per cent per annum, defendants' objection to said ruling being set forth in Defendants' Exception No. 13.

XLIV.

The Court erred in instructing the jury that in returning the verdict they might give the total

amount to be recovered against the defendants without giving the principal and interest separately, defendants' objection to said ruling being set forth in Defendants' Exception No. 14.

XLV.

The Court erred in refusing to give the following instruction requested by defendants:

"You are instructed that plaintiff has resting upon it the burden of proving by a fair preponderance of the evidence that the loss of or damage to the steamer 'Monarch,' sued for in this action, was proximately caused by one or more of the perils insured against by all of the policies of insurance, by the defendants [92] and each of them, which are sued upon herein."

XLVI.

The Court erred in refusing to give the following instruction requested by defendants:

"You are instructed that plaintiff cannot recover in this action against the defendant Aetna Insurance Company unless it shall have shown by a fair preponderance of the evidence that the steamer 'Monarch' was wrecked and totally lost through collision with another ship or vessel or with wharves, piers, stages or similar structures or that it sustained loss or damage caused by fire."

XLVII.

The Court erred in refusing to give the following instruction requested by defendants:

“You are instructed that plaintiff cannot recover in this action against the defendant, Aetna Insurance Company, unless it shall have shown by a fair preponderance of the evidence that the steamer ‘Monarch’ sustained loss or damage through collision with another ship or vessel or with wharves, piers, stages or similar structures and that such damage amounted to \$750, or that it sustained loss or damage caused by fire.”

XLVIII.

The Court erred in refusing to give the following instruction requested by defendants:

“You are instructed that plaintiff cannot recover in this action against the defendant, the Union Marine Insurance Company, unless it shall have shown by a fair preponderance of the evidence that the steamer ‘Monarch’ was wrecked or totally lost through collision with another ship or vessel or with wharves, piers, stages or similar structures or that it sustained loss or [93] damage caused by fire.”

XLIX.

The Court erred in refusing to give the following instruction requested by defendants:

“You are instructed that plaintiff cannot recover in this action against the defendant, the Union Marine Insurance Company, unless it shall have shown by a fair preponderance of the evidence that the steamer ‘Monarch’ sustained loss or damage through collision with

another ship or vessel or with wharves, piers, stages or similar structures and that such damage amounted to \$750 or that it sustained loss or damage caused by fire.”

L.

The Court erred in refusing to give the following instruction requested by defendants:

“You are instructed that plaintiff cannot recover in this action against the defendant the Hartford Fire Insurance Company unless it shall have shown by a fair preponderance of the evidence that the steamer ‘Monarch’ was wrecked and totally lost through collision with another ship or vessel, or with wharves, piers, stages or similar structures or that it sustained loss or damage caused by fire.”

LI.

The Court erred in refusing to give the following instruction requested by defendants:

“You are instructed that plaintiff cannot recover in this action against the defendant, the Hartford Fire Insurance Company, unless it shall have shown by a fair preponderance of the evidence that the steamer ‘Monarch’ sustained loss or damage through collision with another ship or vessel or with wharves, piers, stages or similar structures and that such damage amounted [94] to \$750 or that it sustained loss or damage caused by fire.”

LII.

The Court erred in refusing to give the following instruction requested by defendants:

“You are instructed that there was under the policies here in suit an implied warranty that the ‘Monarch’ was seaworthy and reasonably fit, at the commencement of her voyage, to encounter the ordinary perils of the voyage, and if you find, by a fair preponderance of the evidence, that the said steamer was not, at the commencement of her voyage, reasonably fit to encounter the ordinary perils of said voyage, your verdict must be for the defendants.”

LIII.

The Court erred in refusing to give the following instruction requested by defendants:

“You are instructed that the policies of insurance issued by defendant, Aetna Insurance Company, sued upon herein, insured plaintiff’s interest in the steamer ‘Monarch’ in the sum of \$10,000, only as follows:

“Loss or damage caused by fire, in accordance with the terms and conditions of the regular California Standard Form of Fire Policy as issued by the Aetna Insurance Company of Hartford, Conn.

“Loss or damage done to another ship or vessel through collision in accordance with the terms and conditions of the following collision clause:

“COLLISION CLAUSE.

“And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to [95] pay, and shall pay

by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured, we, the assurers, will pay the assured such proportion of four-fourths of such sum or sums so paid as our subscriptions hereto bear to the value of the ship hereby insured, and in cases in which the liability of the ship has been contested with our consent in writing, we the assurers, will also pay a like proportion of four-fourths of the costs which the assured shall hereby incur or be compelled to pay; but when both vessels are to blame, then, unless the liability of the owners of one or both of such vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the owners of each vessel has been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages, as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision.

“PROVIDED, always that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay for the removal of obstructions under statutory powers, for injury to harbors, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury.

“AND it is further agreed that the principles involved in this clause shall apply to the case where

the vessels are the property in part or in whole of the same owners.

“Loss or damage sustained by the vessel insured through collision with another ship or vessel, or with wharves, piers, [96] stages, or similar structures if amounting to \$750. The cost of repairs of such damage being paid without deduction of one-third new for old.

“The policy also covers while vessel is at wharves or docks and permission granted to carry passengers, freight, material and supplies incidental to her trade; to make alterations and repairs for a period exceeding 15 consecutive days, and to use kerosene oil, gas, and electricity for lights and crude petroleum for fuel.

“Permitted to tow and to be towed and to assist vessels and/or craft in all situations.

“Warranted by the assured confined to San Francisco Bay and/or tributaries including Sacramento and/or San Joaquin Rivers, during the currency of this policy.”

LIV.

The Court erred in refusing to give the following instruction requested by defendants:

“You are instructed that the policies of insurance issued by defendant, the Union Marine Insurance Company, sued upon herein, insured plaintiff’s interest in the steamer ‘Monarch’ in the sum of \$3,750 only, as follows: (Remaining portion of requested instruction is the same as that embodied in the 53d Assignment of Error.)

LV.

The Court erred in refusing to give the following instruction requested by defendants:

“You are instructed that the policies of insurance issued by defendant, Hartford Fire Insurance Company, sued upon herein, insured plaintiff’s interest in the steamer ‘Monarch’ in the sum of \$6,000, only as follows”: (The remaining portion [97] of the requested instruction is the same as that embodied in the 53d Assignment of Error.)”

LVI.

The Court erred in refusing to give the following instruction requested by defendants:

“You are instructed to return a verdict in favor of the defendant, Aetna Insurance Company, for the reason that there is no substantial evidence to sustain a verdict for the plaintiff.”

LVII.

The Court erred in refusing to give the following instruction requested by defendants:

“You are instructed to return a verdict in favor of the defendant, the Union Marine Insurance Company for the reason that there is no substantial evidence to sustain a verdict for the plaintiff.”

LVIII.

The Court erred in refusing to give the following instruction requested by defendants:

“You are instructed to return a verdict in favor of the defendant, the Hartford Fire In-

insurance Company, for the reason that there is no substantial evidence to sustain a verdict for the plaintiff."

WHEREFORE, defendants and plaintiffs in error pray that the judgment of the above-entitled court be reversed.

Dated San Francisco, May 8, 1920.

EDWARD J. McCUTCHEN,

McCUTCHEN, WILLARD, MANNON &
GREENE,

Attorneys for Defendants and Plaintiffs in Error.

[Endorsed]: Filed May 8, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [98]

In the Southern Division of the District Court of
the United States, in and for the Northern
District of California, Second Division.

No. 15,930.

SACRAMENTO-STOCKTON S T E A M S H I P
COMPANY, a Corporation,

Plaintiff,

vs.

AETNA INSURANCE COMPANY, a Corpora-
tion, UNION MARINE INSURANCE
COMPANY, a Corporation, and HART-
FORD FIRE INSURANCE COMPANY, a
Corporation,

Defendants and Petitioners.

Order Allowing Writ of Error.

Upon motion of Edward J. McCutchen, Esq., attorney for the above-named defendants, and upon filing a petition for a writ of error and an assignment of errors,

IT IS ORDERED that a writ of error be and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals, for the Ninth Circuit, the judgment heretofore entered herein and that the amount of bond on said writ of error be and the same is hereby fixed at the sum of seventeen thousand (17,000.00) dollars in so far as the Aetna Insurance Company is concerned; twelve thousand (12,000.00) dollars in so far as the Hartford Fire Insurance Company is concerned, and six thousand (6,000.00) dollars in so far as the Union Marine [99] Insurance Company is concerned, said bonds to serve as a cost bond and as a supersedeas bond on said writ of error.

W. H. HUNT,
Circuit Judge.

[Endorsed]: Filed May 8, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [100]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,930.

SACRAMENTO-STOCKTON STEAMSHIP
COMPANY, a Corporation,

Plaintiff,

vs.

AETNA INSURANCE COMPANY, a Corporation,
UNION MARINE INSURANCE
COMPANY, a Corporation, and HART-
FORD FIRE INSURANCE COMPANY, a
Corporation,

Defendants and Petitioners.

Bond on Writ of Error (Aetna Insurance Company).
KNOW ALL MEN BY THESE PRESENTS:

That we, Aetna Insurance Company, a corporation, as principal, and Hartford Accident and Indemnity Company, a corporation, organized under the laws of the State of Connecticut, as surety, are held and firmly bound unto Sacramento-Stockton Steamship Company, a corporation, plaintiff in the above-entitled action, in the full and just sum of seventeen thousand dollars (\$17,000.00) lawful money of the United States, to be paid to the said plaintiff, Sacramento-Stockton Steamship Company, a corporation, for which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our successors,

representatives and assigns, firmly by these presents. [101]

Sealed with our seals and dated this 8th day of May, 1920.

WHEREAS, the above-named defendants, Aetna Insurance Company, a corporation, Union Marine Insurance Company, a corporation, and Hartford Fire Insurance Company, a corporation, have sued out a writ of error in the United States Circuit Court of Appeals, in and for the Ninth Circuit, to reverse the judgment in the above-entitled action in favor of the plaintiff therein and against the Aetna Insurance Company, a corporation, defendant therein, for the sum of ten thousand five hundred forty-six and 38/100 dollars (\$10,546.38), and against the Union Marine Insurance Company, a corporation, defendant therein, for the sum of three thousand nine hundred fifty-four and 90/100 dollars (\$3,954.90), and against the Hartford Fire Insurance Company, a corporation, defendant therein, for the sum of six thousand three hundred twenty-seven and 83/100 dollars (\$6,327.83), interest and costs;

NOW, THEREFORE, the condition of this obligation is such that if the above-named Aetna Insurance Company, a corporation, shall prosecute such writ of error to effect and answer all damages and costs if it shall fail to make good said plea, then this obligation shall be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF said Aetna Insurance Company, a corporation, Principal, and the

said Hartford Accident and Indemnity Company, a corporation, Surety, have caused their names to be hereunto subscribed and their corporate seals to be hereunto affixed by officers thereunto duly authorized, this 8th day of May, 1920.

AETNA INSURANCE COMPANY,

By J. H. MAUBER,

Marine Asst. Gen. Agt.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

By JAMES W. MOYLES, [Seal]

Its Attorney in Fact. [102]

State of California,

City and County of San Francisco,—ss.

On the 8th day of May, in the year one thousand nine hundred and twenty, before me, John McCallan, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared James W. Moyles, known to me to be the person whose name is subscribed to the within and annexed instrument, as the attorney in fact of the Hartford Accident and Indemnity Company, and acknowledged to me that he subscribed the name of Hartford Accident and Indemnity Company thereto as principal and his own name as the attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed my official seal, at my office, in the said city and county of San Francisco, the day and year first above written.

[Seal]

JOHN McCALLAN,

Notary Public in and for the City and County of San Francisco, State of California.

My commission will expire April 12, 1921.

The within bond is hereby approved this 8th day of May, 1920.

W. H. HUNT,
Circuit Judge.

[Endorsed]: Filed May 8, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [103]

HARTFORD ACCIDENT AND INDEMNITY
CO.,
HARTFORD, CONNECTICUT.

In the Southern Division of the District Court of
the United States, in and for the Northern
District of California, Second Division.

No. 15,930.

SACRAMENTO-STOCKTON STEAMSHIP
COMPANY, a Corporation,
Plaintiff,

vs.

AETNA INSURANCE COMPANY, a Corpora-
tion, UNION MARINE INSURANCE
COMPANY, a Corporation, and HART-
FORD FIRE INSURANCE COMPANY, a
Corporation,

Defendants and Petitioners.

**Bond on Writ of Error (Hartford Fire Insurance
Company).**

KNOW ALL MEN BY THESE PRESENTS:

That we, Hartford Fire Insurance Company, a
corporation, as principal, and Hartford Accident

and Indemnity Company, a corporation, organized under the laws of the State of Connecticut, as surety, are held and firmly bound unto Sacramento-Stockton Steamship Company, a corporation, plaintiff in the above-entitled action, in the full and just sum of twelve thousand dollars (\$12,000.00), lawful money of the United States, to be paid to the said plaintiff, Sacramento-Stockton Steamship Company, a corporation, for which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated this 8th day of May, 1920.

WHEREAS, the above-named defendants, Aetna Insurance Company, a corporation, Union Marine Insurance Company, a corporation, and Hartford Fire Insurance Company, a corporation, have sued out a writ of error in the United States Circuit Court of Appeals, in and for the Ninth Circuit, to reverse the judgment in the above-entitled [104] action in favor of the plaintiff therein, and against the Aetna Insurance Company, a corporation, defendant therein, for the sum of ten thousand five hundred and forty-six and 38/100 (\$10,546.38), and against the Union Marine Insurance Company, a corporation, defendant therein, for the sum of three thousand nine hundred fifty-four and 90/100 (\$3,954.90) dollars and against the Hartford Fire Insurance Company, a corporation, defendant therein, for the sum of six thousand three hundred

twenty-seven and 83/100 dollars (\$6,327.83) interest and costs;

NOW, THEREFORE, the condition of this obligation is such that if the above-named Hartford Fire Insurance Company, a corporation, shall prosecute said writ of error to effect and answer all damages and costs if it shall fail to make good said plea, then this obligation shall be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF said Hartford Fire Insurance Company, a corporation, Principal, and said Hartford Accident and Indemnity Company, a corporation, Surety, have caused their names to be hereunto subscribed and their corporate seals to be hereunto affixed by officers thereunto duly authorized, this 8th day of May, 1920.

HARTFORD FIRE INSURANCE COMPANY,

By LOUIS ROSENTHAL,
G. A. Mar. Dept.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

By JAMES W. MOYLES, [Seal]
Its Attorney in Fact. [105]

State of California,
City and County of San Francisco,—ss.

On the 8th day of May, in the year one thousand nine hundred and twenty, before me, John McCallan, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared James W. Moyles, known to me to be the person whose name is subscribed to the

within and annexed instrument, as the attorney in fact of the Hartford Accident and Indemnity Company, and acknowledged to me that he subscribed the name of Hartford Accident and Indemnity Company thereto as principal and his own name as the attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed my official seal, at my office, in the said city and county of San Francisco, the day and year first above written.

[Seal] JOHN McCALLAN,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission will expire April 12, 1921.

The within bond is hereby approved this 8th day
of May, 1920.

W. H. HUNT,
Circuit Judge.

[Endorsed]: Filed May 8, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [106]

HARTFORD ACCIDENT AND INDEMNITY
CO.,
HARTFORD, CONNECTICUT.

In the Southern Division of the District Court of
the United States, in and for the Northern
District of California, Second Division.

No. 15,930.

SACRAMENTO-STOCKTON STEAMSHIP
COMPANY, a Corporation,

Plaintiff,

vs.

AETNA INSURANCE COMPANY, a Corpora-
tion, UNION MARINE INSURANCE
COMPANY, a Corporation, and HART-
FORD FIRE INSURANCE COMPANY, a
Corporation,

Defendants and Petitioners.

**Bond on Writ of Error (Union Marine Insurance
Company).**

KNOW ALL MEN BY THESE PRESENTS:

That we, Union Marine Insurance Company, a
corporation, as principal, and Hartford Accident
and Indemnity Company, a corporation, organized
under the laws of the State of Connecticut, as
surety, are held and firmly bound unto Sacramento-
Stockton Steamship Company, a corporation, plain-
tiff in the above-entitled action, in the full and just
sum of six thousand and 00/100 dollars, (\$6,000.00)
lawful money of the United States, to be paid to
the said plaintiff Sacramento-Stockton Steamship

Company, a corporation, for which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated this 8th day of May, 1920.

WHEREAS the above-named defendants Aetna Insurance Company, a corporation, Union Marine Insurance Company, a corporation, and Hartford Fire Insurance Company, a corporation, have sued out a writ of error in the United States Circuit Court of Appeals, in [107] and for the Ninth Circuit, to reverse the judgment in the above-entitled action in favor of the plaintiff therein and against the Aetna Insurance Company, a corporation, defendant therein, for the sum of ten thousand five hundred forty-six and 38/100 dollars (\$10,546.38) and against the Union Marine Insurance Company, a corporation, defendant therein, for the sum of three thousand nine hundred fifty-four and 90/100 dollars (\$3,954.90) and against the Hartford Fire Insurance Company, a corporation, defendant therein, for the sum of six thousand three hundred twenty-seven and 83/100 dollars (\$6,327.83), interest and costs;

NOW, THEREFORE, the condition of this obligation is such that if the above-named Union Marine Insurance Company, a corporation, shall prosecute such writ of error to effect and answer all damages and costs if it shall fail to make good said plea, then this obligation shall be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF said Union Marine Insurance Company, a corporation, principal, and Hartford Accident and Indemnity Company, a corporation, surety, have caused their names to be hereunto subscribed and their corporate seals to be hereunto affixed by officers thereunto duly authorized, this 8th day of May, 1920.

UNION MARINE INSURANCE COMPANY,

By G. H. WEST,
Underwriter.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

By JAMES W. MOYLES, [Seal]
Its Attorney in Fact. [108]

State of California,
City and County of San Francisco,—ss.

On the 8th day of May, in the year one thousand nine hundred and twenty, before me, John McCallan, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared James W. Moyles, known to me to be the person whose name is subscribed to the within and annexed instrument, as the attorney in fact of the Hartford Accident and Indemnity Company, and acknowledged to me that he subscribed the name of Hartford Accident and Indemnity Company thereto as principal and his own name as the attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed my official seal, at my office, in the said city and county of San Francisco, the day

[Seal]

JOHN McCALLAN,

Notary Public in and for the City and County of
San Francisco, State of California.

My commission will expire April 12, 1921.

The within bond is hereby approved this 8th day of May, 1921.

W. H. HUNT,

Circuit Judge.

[Endorsed]: Filed May 8, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [109]

In the Southern Division of the District Court of
the United States, in and for the Northern Dis-
trict of California, Second Division.

No. 15,930.

SACRAMENTO-STOCKTON STEAMSHIP
COMPANY, a Corporation,

Plaintiff,

VS.

AETNA INSURANCE COMPANY, a Corporation,
UNION MARINE INSURANCE COMPANY, a Corporation,
HARTFORD FIRE INSURANCE COMPANY, a Corporation,

Defendants.

Stipulation for Withdrawal of Original Exhibits.

IT IS HEREBY STIPULATED AND AGREED
by and between the respective parties hereto that

all exhibits introduced upon the trial of the above-entitled action may go up to the Circuit Court of Appeals on the writ of error heretofore sued out herein as original exhibits, and that the clerk of the Circuit Court of Appeals is hereby authorized and directed to photograph the original policies of insurance, Exhibits 1, 2 and 3, and annex said photographs to the printed record prepared by him in said cause.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Plaintiff.

McCUTCHEN, OLNEY & WILLARD,
McCUTCHEN, WILLARD, MANNON &
GREENE,

Attorneys for Defendants.

Approved.

R. S. BEAN, '
District Judge.

[Endorsed]: Filed October 27, 1920. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [110]

UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California.

Clerk's Office.—No. 15,930.

SACRAMENTO-STOCKTON STEAMSHIP
COMPANY, a Corporation
vs.

AETNA INSURANCE COMPANY, a Corporation,
et al.,

Defendants.

Praeceptum for Transcript of Record.

To the Clerk of said Court:

Sir:—Please make up record on writ of error heretofore sued out and include therein judgment-roll, bill of exceptions, petition for writ of error, assignment of errors, order allowing writ of error, bond on writ of error, stipulation for sending up of original exhibits.

McCUTCHEN, WILLARD, MANNON &
GREENE,

Attorneys for Defendants.

[Endorsed]: Filed Oct. 26, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [111]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 15,930.

THE SACRAMENTO-STOCKTON STEAMSHIP
COMPANY, a Corporation,

Plaintiff,

vs.

THE AETNA INSURANCE COMPANY, a Corporation et al.,

Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing one hundred eleven (111) pages, numbered from 1 to 111, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$52.60; that said amount was paid by the defendants, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 15th day of November, A. D. 1920.

[Seal] WALTER B. MALING,
Clerk United States District Court for the North-
ern District of California. [112]

In the Southern Division of the District Court of
the United States, in and for the Northern Dis-
trict of California, Second Division.

No. 15,930.

SACRAMENTO-STOCKTON S T E A M S H I P
COMPANY, a Corporation,

Plaintiff,

vs.

AETNA INSURANCE COMPANY, a Corpora-
tion, UNION MARINE INSURANCE
COMPANY, a Corporation, and HARTFORD
FIRE INSURANCE COMPANY, a Cor-
poration,

Defendants and Petitioners.

Writ of Error.

The United States of America—ss.

The President of the United States of America, to
the Honorable, the Judges of the District Court
of the United States, for the Northern District
of California, GREETING:

Because in the record and proceedings, as also in
the rendition of a judgment, of a plea which is in

the said District Court, before you, or some of you, between Sacramento-Stockton Steamship Company, a corporation, plaintiff, and Aetna Insurance Company, a corporation, Union Marine Insurance Company, a Corporation, and Hartford Fire Insurance Company, a corporation, defendants and plaintiffs in error, a manifest error hath happened to the great damage of the said defendants and plaintiffs in error, as by this complaint doth appear; and that, being willing that error, if any hath [113] been should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if the judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at the City and County of San Francisco, in the State of California, within thirty (30) days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 8th day of

May, in the year of our Lord one thousand nine hundred and twenty.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, for the
Northern District of California.

By J. A. Schaertzer,
Deputy Clerk. [114]

Receipt of a copy of the within writ of error is
hereby admitted this 8th day of May, 1920.

NATHAN H. FRANK,
IRVING H. FRANK,
Attys. for Defendant in Error.

[Endorsed]: No. 15,930. In the Southern Division of the United States District Court for the Northern District of California, Second Division. Sacramento-Stockton Steamship Company, a Corporation, Plaintiff, vs. Aetna Insurance Company, a Corporation et al., Defendants and Petitioners. Writ of Error. Filed May 12, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Return to Writ of Error.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,

Clerk U. S. District Court, Northern District of
California. [115]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Sacramento-Stockton Steamship Company, a Corporation, and to Nathan H. Frank and Irving H. Frank, Its Attorneys, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, wherein Aetna Insurance Company, a corporation, Union Marine Insurance Company, a corporation, and Hartford Fire Insurance Company, a corporation, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable W. H. HUNT, United States Circuit Judge for the Ninth Circuit, this 8th day of May, A. D. 1910.

W. H. HUNT,

United States Circuit Judge. [116]

Receipt of a copy of the within citation is admitted this 8th day of May, 1920.

NATHAN H. FRANK,
IRVING H. FRANK,
Attys. for Defendant in Error.

[Endorsed]: No. 15,930. United States District Court for the Northern District of California. Aetna Insurance Co. et al., Plaintiffs in Error, vs. Sacramento-Stockton Steamship Company, Defendant in Error. Citation on Writ of Error. Filed May 12, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

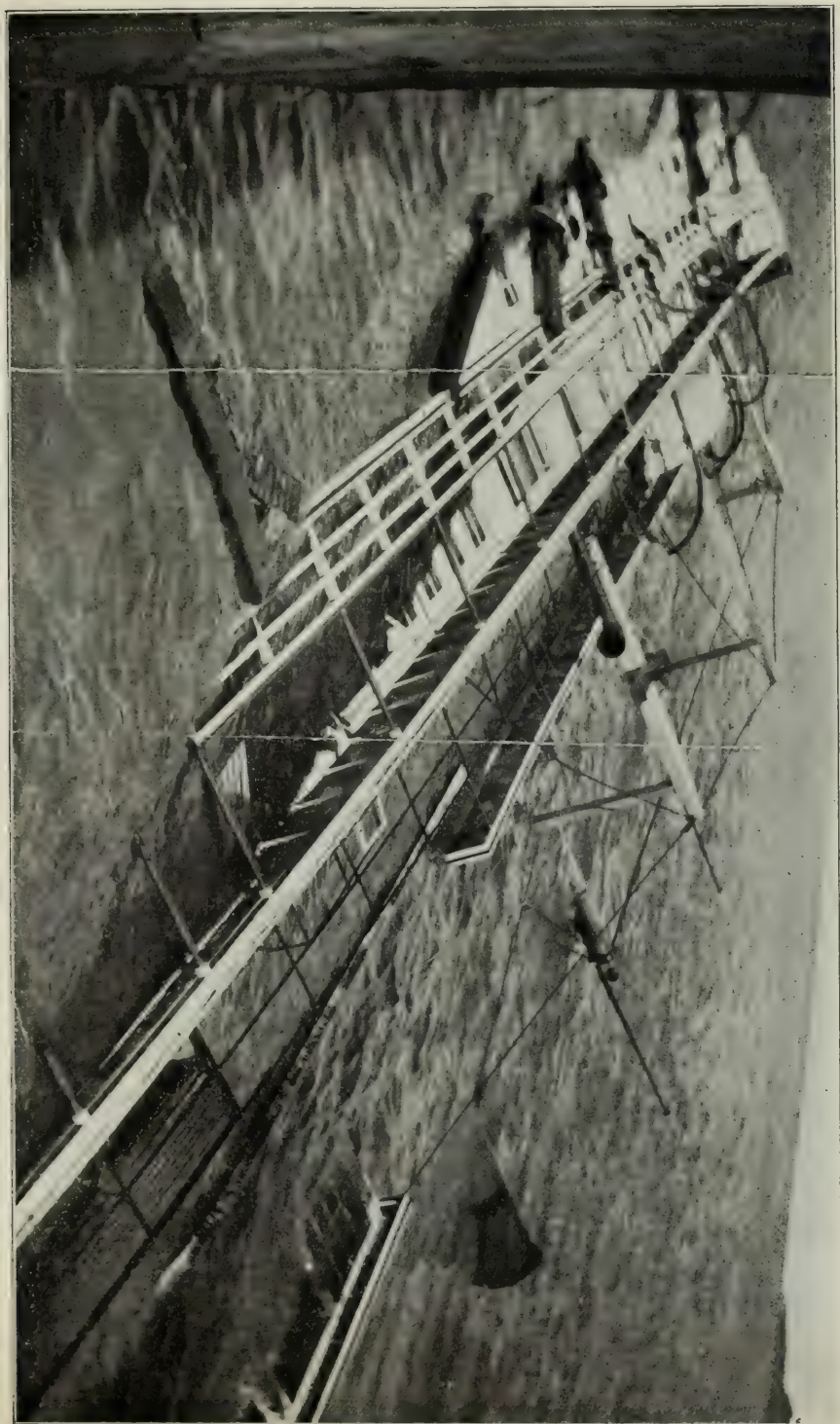
[Endorsed]: No. 3601. United States Circuit Court of Appeals for the Ninth Circuit. Aetna Insurance Company, a Corporation, Union Marine Insurance Company, a Corporation, and Hartford Fire Insurance Company, a Corporation, Plaintiffs in Error, vs. Sacramento Stockton Steamship Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed November 15, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

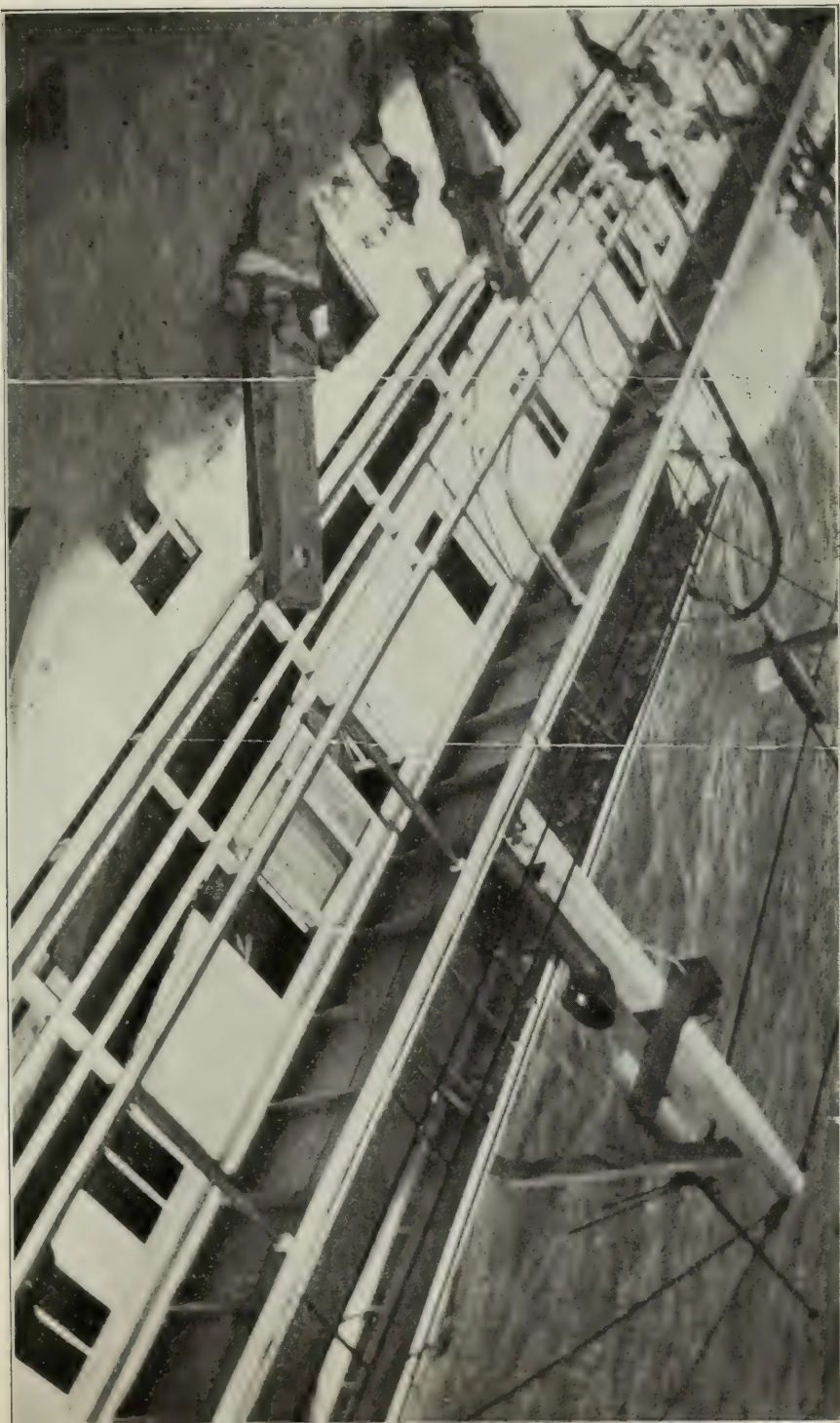
Sacramento-Stockton Steamship Company. 165
Defendant's Exhibit "A."



[Endorsed]: No. 15930. U. S.—Court, Nor.
Dist. of Cal. Defs. Exhibit “A.” 6/16/16. M., Clerk.

No. 3601. United States Circuit Court of Appeals
for the Ninth Circuit, Filed Nov. 15, 1920. F. D.
Monckton, Clerk.

Defendant's Exhibit "B."



[Endorsed]: No. 15930. U. S.—Court, Nor.
Dist. of Cal. Defs. Exhibit “B.” 6/16/16. M., Clerk.

No. 3601. United States Circuit Court of Appeals
for the Ninth Circuit. Filed Nov. 15, 1920. F. D.
Monckton, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 15,930.

SACRAMENTO – STOCKTON STEAMSHIP
COMPANY, a Corporation,

Plaintiff,

vs.

AETNA INSURANCE COMPANY, a Corpora-
tion, UNION MARINE INSURANCE COM-
PANY, a Corporation, and HARTFORD
FIRE INSURANCE COMPANY, a Corpo-
ration,

Defendants and Petitioners.

**Stipulation and Order Extending Time to and In-
cluding July 19, 1920, to File Record and Docket
Cause.**

IT IS HEREBY STIPULATED AND AGREED
by and between the respective parties hereto that
the time for printing the record and filing and dock-
eting this cause on writ of error in the United States
Circuit Court of Appeals for the Ninth Circuit may
be, and the same is hereby extended to and including
the 19th day of August, 1920.

Dated: San Francisco, California, June 7, 1920.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Plaintiff.

FARNHAM P. GRIFFITHS,

McCUTCHEN, WILLARD, MANNON

& GREENE,

Attorneys for Defendants and Petitioner.

It is so ordered by the Court.

W. H. HUNT,
Judge.

Dated: June 7, 1920.

[Endorsed]: No. 15,930. No. 3601. In the United States Circuit Court of Appeals for the Ninth Circuit. Sacramento-Stockton Steamship Company, a Corporation, Plaintiff, vs. Aetna Insurance Company, a Corporation, Union Marine Insurance Company, a Corporation, and Hartford Fire Insurance Company a Corporation, Defendants and Petitioners. Stipulation and Order Extending Time for Docketing Cause on Writ of Error. Filed Jun. 7, 1920. F. D. Monckton, Clerk. Refiled Nov. 15, 1920. F. D. Monckton Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 15,930.

SACRAMENTO - STOCKTON STEAMSHIP
COMPANY, a Corporation,
Plaintiff,

vs.

AETNA INSURANCE COMPANY, a Corpora-
tion, UNION MARINE INSURANCE COM-
PANY, a Corporation, and HARTFORD
FIRE INSURANCE COMPANY, a Corpo-
ration,

Defendants and Petitioners.

Stipulation and Order Extending Time to and Including August 19, 1920, to File Record and Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the time for printing the record and filing and docketing this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit may be, and the same is hereby extended to and including the 19th day of August, 1920.

Dated: San Francisco, California, July 17, 1920.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Plaintiff.

FARNHAM P. GRIFFITHS,

McCUTCHEN, WILLARD, MANNON

& GREENE,

Attorneys for Defendants and Petitioner.

It is so ordered by the Court.

W. H. HUNT,

United States Circuit Judge.

Dated: July 19, 1920.

Service of the within stipulation and order extending time and receipt of a copy is hereby admitted this 17th day of July, 1920.

[Endorsed]: No. 15,930. No. 3601 In the United States Circuit Court of Appeals for the Ninth Circuit. Sacramento-Stockton Steamship Company, a Corporation, Plaintiff, vs. Aetna Insurance Company, a Corporation, Union Marine Insurance Company, a Corporation, and Hartford Fire Insurance

Company, a Corporation, Defendants and Petitioners. Stipulation and Order Extending Time for Docketing Cause on Writ of Error. Filed Jul. 19, 1920. F. D. Monckton, Clerk. Refiled Nov. 15, 1920. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 15,930.

SACRAMENTO - STOCKTON STEAMSHIP
COMPANY, a Corporation,
Plaintiff,

vs.

AETNA INSURANCE COMPANY, a Corporation,
UNION MARINE INSURANCE COMPANY, a Corporation, and HARTFORD
FIRE INSURANCE COMPANY, a Corporation.

Defendants and Petitioners.

Stipulation and Order Extending Time to and Including September 20, 1920, to File Record and Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the time for printing the record and filing and docketing this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit may be, and the same is hereby extended to and including the 20th day of September, 1920.

Dated, San Francisco, California, August 17, 1920.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Plaintiff.

FARNHAM P. GRIFFITHS,

McCUTCHEEN, WILLARD, MANNON

& GREENE,

Attorneys for Defendants and Petitioners.

It is so ordered by the Court.

Dated, August 17th, 1920.

W. H. HUNT,

Judge.

[Endorsed]: No. 15,930. No. 3601. In the United States Circuit Court of Appeals for the Ninth Circuit. Sacramento-Stockton Steamship Company, a Corporation, Plaintiff, vs. Aetna Insurance Company, a Corporation et al., Defendants and Petitioners. Stipulation and Order Extending Time for Docketing Cause on Writ of Error. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including Sept. 20, 1920, to File Record and Docket Cause. Filed Aug. 17, 1920. F. D. Monckton, Clerk. Refiled Nov. 15, 1920. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 15,930.

SACRAMENTO – STOCKTON STEAMSHIP
COMPANY, a Corporation,
vs.

AETNA INSURANCE COMPANY, a Corpora-
tion, UNION MARINE INSURANCE COM-
PANY, a Corporation, and HARTFORD
FIRE INSURANCE COMPANY, a Corpo-
ration,

**Stipulation and Order Extending Time to and In-
cluding November 19, 1920, to File Record and
Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED
by and between the respective parties hereto that the
time for printing the record and filing and docketing
this cause on writ of error in the United States Cir-
cuit Court of Appeals for the Ninth Circuit may be,
and the same is hereby extended to and including
the 19th day of November, 1920.

Dated: San Francisco, California, September 17,
1920.

NATHAN H. FRANK,
IRVING H. FANK,
Attorneys for Plaintiff.

FARNHAM P. GRIFFITHS,
McCUTCHEN, WILLARD, MANNON
& GREENE,
Attorneys for Defendants and Petitioners.

It is so ordered by the Court.

WM. W. MORROW,
Judge.

Dated September 17, 1920.

[Endorsed]: No. 15,930. No. 3601. In the United States Circuit Court of Appeals for the Ninth Circuit. Sacramento-Stockton Steamship Company, a Corporation, Plaintiff, vs. Aetna Insurance Company, a Corporation et al., Defendants and Petitioners. Stipulation and Order Extending Time for Docketing Cause on Writ of Error. Filed Sep. 17, 1920. F. D. Monckton, Clerk. Refiled Nov. 15, 1920. F. D. Monckton, Clerk. 51

STEAMER "MONARCH"

THIS POLICY IS TO COVER ONLY AS FOLLOWS:

Loss or damage caused by fire, in accordance with the terms and conditions of the regular California Standard Form of Fire policy as issued by the Aetna Insurance Company of Hartford, Conn.

Loss or damage done to another ship or vessel through collision in accordance with the terms and conditions of the following collision clause:

COLLISION CLAUSE

And it is further agreed that if the Ship hereby Insured shall come into collision with any other Ship or Vessel, and the Assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the Ship hereby Insured, we, the Assurers, will pay the Assured such proportion of four-fourths of such sum or sums so paid as our subscriptions hereto bear to the value of the Ship hereby Insured and in cases in which the liability of the Ship has been contested with our consent in writing, we the Assurers, will also pay a like proportion of four-fourths of the costs which the Assured shall thereby incur or be compelled to pay; but when both Vessels are to blame, then, unless the liability of the Owners of one or both of such Vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the Owners of each Vessel had been compelled to pay to the owners of the other of such Vessels such one-half or other proportion of the latter's damages, as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of such collision.

Provided always that this Clause shall in no case extend to any sum which the Assured may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbors, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the Cargo or engagements of the Insured Vessel, or for loss of life or personal injury.

And it is further agreed that the principles involved in this clause shall apply to the case where the vessels are the property in part or in whole of the same owners.

Loss or damage sustained by the vessel insured through collision with another ship or vessel, or with wharves, piers, stages, or similar structures if amounting to \$ 750.00 The cost of repairs of such damage being paid without deduction of one-third new for old.

This policy also covers while vessel is at wharves or docks and permission granted to carry passengers, freight, material and supplies incidental to her trade; to make alterations and repairs for a period exceeding 15 consecutive days, and to use kerosene oil, gas, and electricity for lights and crude petroleum for fuel.

Permitted to tow and to be towed and to assist vessels and or craft in all situations.

Warranted by the Assured confined to waters of San Francisco Bay and tributaries including Sacramento and/or San Joaquin Rivers.

during the currency of this policy.

The foregoing clauses are to be regarded as substituted for the terms of the policy to which they are attached, the latter being hereby waived.

Attached to Policy No.

709.

The Union Marine Insurance Company, Limited.

PACIFIC COAST BRANCH

W. IRVING, *Manager*
 R. GALLEGO, *Asst. Manager*
 C. WM. HENDERSON,
Marine Underwriter

HEAD OFFICE

11 Dale Street, LIVERPOOL
 H. R. ROBERTSON
Chairman
 J. SANDERMAN ALLEN
Gen. Manager and Secretary

BRANCH OFFICES AT

LONDON: 1 Threadneedle Street
 MANCHESTER: 47 Spring Gardens
 GLASGOW: 22 Royal Exchange Square
 NEW YORK: 51 Wall Street

Whereas it hath been proposed to

The Union Marine Insurance Company, Limited
 by **Sacramento-Stockton Steamship Co.**

as well in his or their own name as for and in the name or names of all and every other person or persons to whom the subject matter of this Policy does may or shall appertain in part or in all to make with the said Company the Insurance hereinafter mentioned and described.

NOW THIS POLICY WITNESSETH that in consideration of the said person or persons effecting this Policy promising to pay to the said Company the sum of **One hundred twelve and 50/100 Dollars** as a premium at and after the rate of **three** per cent, the said Company takes upon itself the burthen of such Insurance to the amount of **Thirty seven hundred fifty and 00/100 Dollars.** to be insured from **July 22nd, 1914 noon Pacific Standard Time to July 22nd, 1915 noon Pacific Standard Time.**

Sum Insured.
\$3750.00

As employment may offer, in port and at sea, in docks and graving docks, and on the ways, gridirons and pontoons, at all times, in all places and on all occasions, services and trades whatsoever and wheresoever, under steam or sail, upon the Body, Tackle, Apparel, Ordnance, Munitions, Artillery, Boat and other Furniture of and in the good

Steamer called the **"MONARCH"**.

or by whatsoever other name or names the said ship is or shall be named or called, beginning the adventure upon the said ship, &c., as above, and shall so continue and endure during the period as aforesaid. Should the above vessel be at sea on the expiration of this Policy, it is agreed to hold her covered until arrival at port of destination on her being moored therein twenty-four hours in good safety (provided that before the expiration the Assured shall have given notice of intention to so continue) at a *pro rata* monthly premium, and it shall be lawful for the said ship, &c., to proceed and sail to and touch and stay at any Ports or Places whatsoever and wheresoever without prejudice to this Insurance. The said ship, &c., for so much as concerns the assured, by agreement between the Assured and Assurers in this Policy, are and shall be valued at as follows:

Rate per cent.

3

Hull, Tackle, Apparel and Furniture, . . . \$ ---

Machinery and Boilers, . . . \$ ---

FORTY THOUSAND AND 00/100 **\$40,000.00** Dollars.

TOUCHING the Adventures and Perils which we, the said Insurers, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Bovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprizals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People, of what Nation, Condition or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said ship, &c., or any part thereof.

In case of any Loss or Misfortune, it shall be lawful to the Insured, their Factors, Brokers and Assigns, to sue, labor and travel for, in, and about the Defense, Safeguard and recovery of the said ship, &c., or any part thereof, without prejudice to this Insurance; to the charges whereof the said Insurance Company will contribute according to the Rate and Quantity of the sum herein insured. And it is specially declared and agreed that no act of the Insurer or Insured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of such misfortune.

Premium.

\$112.50

Free from average under Three per cent unless general or the ship be stranded, sunk or burnt, on fire or in collision with another ship or vessel. Claims, if any, including claim for constructive total loss, to be adjusted according to English law and practice.

With leave to sail with or without Pilots, to tow and assist vessels and craft in all situations, and to be towed and to go on trial trips. With liberty to dispatch, exchange, and take on board goods, specie, passengers and stores, wherever the vessel may call at or proceed to, without being deemed a deviation, and with liberty to carry goods, live cattle, &c., on deck or otherwise, but warranted free from any claim in respect of loss of cattle or goods stored on deck.

Average payable on each valuation separately, or on the whole. Each voyage to be subject to separate average.

In event of damage, cost of repairs to be paid without deduction of one-third, whether the average be particular or general.

General average payable at *par* foreign custom if required, or *par* York-Antwerp Rules, if in accordance with the contract of freightment.

Warranted free of capture, seizure and detention and the consequences thereof or any attempt thereof piracy excepted and also from all consequences of riots and civil commotions, hostilities or warlike operations whether before or after declaration of war. Warranted free of loss or damage caused by strikers locked-out workmen or persons taking part in labor disturbances or riots or civil commotions.

IN WITNESS WHEREOF this policy has been signed in San Francisco, State of California, this **22nd** day of **July** 1914 - for and on behalf of the said Company, by virtue of Power of Attorney granted by said Company at behalf.

Wm. Henderson
 UNDERWRITER.

LETTERS ON SLIP ATTACHED
 AT OF THIS POLICY.

This Insurance subject to limitations of trade as per ship document.

ENGLISH FORM

HULL TIME

**The Union Marine
Insurance Company, Ltd.**
OF LIVERPOOL

No. 709

Expires July 22, 1915.

Vessel

S.S. "MONARCH"

Assured

Sacramento-Stockton S.S.Co.

\$ 3750. at 3 %

\$ 112.50

W. IRVING SMITH
MANAGER
PACIFIC COAST BRANCH
343 SANSOME ST. SAN FRANCISCO, CAL.
General Insurance Agent

No. 3601
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED
NOV 15 1920
F. D. MONCKTON.
CLERK.

15930
Pitts
6/15/16
SA

STEAMER S. S. "MONARCH"

THIS POLICY IS TO COVER ONLY AS FOLLOWS:

Loss or damage caused by fire, in accordance with the terms and conditions of the regular California Standard Form of Fire policy as issued by the Aetna Insurance Company of Hartford, Conn.

Loss or damage done to another ship or vessel through collision in accordance with the terms and conditions of the following collision clause:

COLLISION CLAUSE

And it is further agreed that if the Ship hereby insured shall come into collision with any other Ship or Vessel, and the Assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the Ship hereby insured, we, the Assurers, will pay the Assured such proportion of four-fourths of such sum or sums so paid as our subscriptions hereto bear to the value of the Ship hereby insured and in cases in which the liability of the Ship has been contested with our consent in writing, we the Assurers, will also pay a like proportion of four-fourths of the costs which the Assured shall thereby incur or be compelled to pay; but when both Vessels are to blame, then, unless the liability of the Owners of one or both of such Vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the Owners of each Vessel had been compelled to pay to the owners of the other of such Vessels such one-half or other proportion of the latter's damages, as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of such collision.

Provided always that this Clause shall in no case extend to any sum which the Assured may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbors, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the Cargo or engagements of the Insured Vessel, or for loss of life or personal injury.

And it is further agreed that the principles involved in this clause shall apply to the case where the vessels are the property in part or in whole of the same owners.

Loss or damage sustained by the vessel insured through collision with another ship or vessel, or with wharves, piers, stages, or similar structures if amounting to \$ 750.- ship or The cost of repairs of such damage being paid without deduction of one-third new for old.

This policy also covers while vessel is at wharves or docks and permission granted to carry passengers, freight, material and supplies incidental to her trade; to make alterations and repairs for a period exceeding 15 consecutive days, and to use kerosene oil, gas, and electricity for lights and crude petroleum for fuel.

Permitted to tow and to be towed and to assist vessels and/or craft in all situations.

Warranted by the Assured confined to San Francisco Bay and/or
tributaries, including Sacramento and/or San Joaquin
Rivers.

during the currency of this policy.

The foregoing clauses are to be regarded as subject to the terms of the policy to which they are attached, the latter being hereby

Attached to Policy No. 3563

ETNA INSURANCE CO.
[Signature]

Aetna Insurance Company

Hartford, Connecticut

Incorporated, 1819

Cash Capital \$5,000,000



PACIFIC BRANCH, SAN FRANCISCO, CALIFORNIA

SACRAMENTO-STOCKTON STEAMSHIP COMPANY

On account of

Concerned

In case of loss, to be paid in funds current in the United States to

Assured, or order

Policy No.

3563

Does make Insurance and cause TEN THOUSAND DOLLARS

To be insured From July 22nd, 1914 at Noon, Pacific Standard Time

to July 22nd, 1915 at Noon, Pacific Standard Time

As employment may offer, in port and at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places and on all occasions, services and trades whatsoever and whosoever, under steam or sail, upon the Body, Tackle, Apparel, Ordnance, Munitions, Artillery, Boat and other Furniture of and in the good

Steamer

called the

"MONARCH"

Sum insured,

\$10,000.-

or by whatsoever other name or names the said ship is or shall be named or called, beginning the adventure upon the said ship, &c., as above, and shall so continue and endure during the period as aforesaid. Should the above vessel be at sea on the expiration of this Policy, it is agreed to hold her covered until arrival at port of destination on her being moored therein twenty-four hours in good safety (provided that before the expiration the Assured shall have given notice of intention to so continue) at a *pro rata* monthly premium, and it shall be lawful for the said ship, &c., to proceed and sail to and touch and stay at any Ports or Places whatsoever and whosoever without prejudice to this Insurance. The said ship, &c., for so much as concerns the assured, by agreement between the Assured and Assurers in this Policy, are and shall be valued at as follows:

Hull, Tackle, Apparel and Furniture, \$ ---

Machinery and Boilers, \$ ---

\$40,000.-

Rate per cent.

3.

FORTY THOUSAND

DOLLARS.

TOUCHING the Adventure and Perils which we, the said Insurers, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Robbers, Thieves, Jettisons, Letters of Mart and Countermart, Surprises, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People, of what Nation, Condition or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses, and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said ship, &c., or any part thereof; and in case of any Loss or Misfortune it shall be lawful to the Insured, their Factors, Servants and Assigns, to sue, labor and travel for, in, and about the Defense, Safeguard and Recovery of the said ship, &c., or any part thereof, without prejudice to this Insurance; ~~and the Insured shall be bound to indemnify the Insurers for the full amount of the loss or damage sustained by the Insurers in the recovery of the said ship, &c., or any part thereof, without prejudice to this Insurance.~~ And it is specially declared and agreed that no acts of the Insured or Insured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment, having been paid the consideration for this Insurance, by the Insured or his or their Assigns, at and after the rate of *per cent.*, to return *per cent.* for every 30 consecutive days the vessel may be laid up in port, or in dock, during such period the vessel being at the risk of the Insurers--to return *pro rata* premium for every 30 days of unexpired time, if this Policy be cancelled *pro rata*.

Claims, if any, including claim for constructive total loss, to be adjusted according to English law and practice. With leave to sail with or without Pilot, to tow and assist vessels and craft in all situations, and to be towed and to go on trial trips. With liberty to discharge, exchange, and take on board goods, specie, passengers and stores, wherever the vessel may call at or proceed to, without being deemed a deviation, and with liberty to carry goods, live cattle, &c., on deck or otherwise, but warranted free from any claim in respect of jettison of cattle or goods carried on deck ~~in the event of damage to the vessel or cargo, the Insured shall be bound to indemnify the Insurers for the full amount of the loss or damage sustained by the Insurers in the recovery of the said ship, &c., or any part thereof, without prejudice to this Insurance.~~

~~It is agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall be liable to pay, or shall pay any sums not exceeding the value of the ship hereby insured, in respect of injury to such other ship or vessel, itself, or to the goods and effects on board thereof, or for loss of freight then being carried on such goods by such other ship or vessel, the INSURERS will pay the Insured, or his or their Assigns, the full amount of such sums as the amount hereby insured bears to the value of the ship hereby insured. But this agreement shall not be construed as extending to any sums which the Insured may become liable to pay, or shall pay in respect of loss of cargo or to individuals, from any cause whatever.~~

~~Provided always that this agreement shall in no case extend to any sums which the Insured may become liable to pay, or shall pay for the removal of obstructions under statutory powers, for injury to harbors, wharves, piers, stages and similar structures consequent on such collision.~~

It is agreed that any change of interest in the vessel hereby insured shall not affect the validity of this Policy. If there be an Agent of the INSURERS located at or near any place where repairs are made, or proofs of loss or average taken, said Agent must be represented on the survey, if any be held, and all bills for repairs, or proofs of loss or average, must be certified to by him, or they will not be allowed by this Company.

In Witness Whereof, the said ETNA INSURANCE COMPANY, has caused this Policy to be signed by its President, and attested by its Marine Secretary, at its office in the CITY OF HARTFORD, and State of Connecticut, and this Policy is made and accepted upon the above expressed conditions, but shall not be valid unless countersigned by the duly authorized Agents of the Company.

Countersigned at SAN FRANCISCO, CAL.

this 22nd day of July, 1914.

E. J. Kingston
Agent

W. S. H. H. H.
President
W. S. H. H. H.
Marine Secretary

It is agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall be liable to pay, or shall pay any sums not exceeding the value of the ship hereby insured, in respect of injury to such other ship or vessel, itself, or to the goods and effects on board thereof, or for loss of freight then being carried on such goods by such other ship or vessel, the INSURERS will pay the Insured, or his or their Assigns, the full amount of such sums as the amount hereby insured bears to the value of the ship hereby insured. But this agreement shall not be construed as extending to any sums which the Insured may become liable to pay, or shall pay in respect of loss of cargo or to individuals, from any cause whatever.

HULL TIME

ENGLISH FORM

No. 3863

Expires, July 22nd, 1915

VESSEL

S. S. "MONARCH"

ASSURED

SACRAMENTO STOCKTON S.S. CO.

Aetna Insurance Company
Hartford, Connecticut

MARINE DEPARTMENT

325 California Street

SAN FRANCISCO, CAL.

\$ 10,000. - at 3. %

\$ 300. -

H. STEPHENS JR. & CO.
General Insurance Agents

NO. 3601
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED
NOV 15 1920
F. D. MONCKTON.
CLERK.

15930

Copies 2
6/15/16

THIS POLICY IS TO COVER ONLY AS FOLLOWS:

Loss or damage caused by fire, in accordance with the terms and conditions of the regular California Standard Form of Fire policy as issued by the Hartford Fire Insurance Company of Hartford, Connecticut.

Loss or damage done to another ship or vessel through collision in accordance with the terms and conditions of the following collision clause:

COLLISION CLAUSE

And it is further agreed that if the Ship hereby insured shall come into collision with any other Ship or Vessel, and the Assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the Ship hereby insured, we, the Assurers, will pay the Assured such proportion of four-fourths of such sum or sums so paid as our subscriptions hereto bear to the value of the Ship hereby insured and in cases in which the liability of the Ship has been contested with our consent in writing, we the Assurers, will also pay a like proportion of four-fourths of the costs which the Assured shall thereby incur or be compelled to pay; but when both Vessels are to blame, then, unless the liability of the Owners of one or both of such Vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the Owners of each Vessel had been compelled to pay to the owners of the other of such Vessels such one-half or other proportion of the latter's damages, as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of such collision.

PROVIDED ALWAYS THAT THIS CLAUSE IN NO CASE EXTEND TO ANY SUM WHICH THE ASSURED MAY BECOME LIABLE TO PAY, OR SHALL PAY FOR REMOVAL OF OBSTRUCTIONS UNDER STATUTORY POWERS, FOR INJURY TO HARBORS, WHARVES, PIERS, STAGES, AND SIMILAR STRUCTURES, CONSEQUENT ON SUCH COLLISION, OR IN RESPECT OF THE CARGO OR ENGAGEMENTS OF THE INSURED VESSEL, OR FOR LOSS OF LIFE OR PERSONAL INJURY.

And it is further agreed that the principles involved in this clause shall apply to the case where the vessels are the property in part or in whole of the same owners.

Loss or damage sustained by the vessel insured through collision with another ship or vessel, or with wharves, piers, stages, or similar structures if amounting to \$750.00

The cost of repairs of such damage being paid without deduction of one-third new for old.

This policy also covers while vessel is at wharves or docks and permission granted to carry passengers, freight, material and supplies incidental to her trade; to make alterations and repairs for a period exceeding 15 consecutive days, and to use kerosene oil, gas, and electricity for lights and crude petroleum for fuel.

Permitted to tow and to be towed and to assist vessels and/or craft in all situations.

Warranted by the Assured confined to waters of San Francisco Bay and tributaries including Sacramento and/or San Joaquin Rivers.

during the currency of this policy.

The foregoing clauses are to be regarded as substituted for the terms of the policy to which they are attached, the latter being hereby waived.

Attached to Policy No. 4003E.

Dwight Howard



Sacramento - Stockton Steamship Co.

On account of whom concerned

In case of loss, to be paid in funds current in the United States to

Policy No. 11255

Them. or or'er

Does make Insurance and cause Six thousand and 00/100 Dollars

As employed and any offer, in part and at sea, is not getting on, and is not getting on, at all times, in all places and on all occasions, services and trade whatsoever and wheresoever, under steam or sail, upon the Body, Tackle, Apparel, Ordnance, Munitions, Artillery, Boat and other Furniture of and in the good

Steamer called the "Monarch"

Sum Insured.

\$ 4,000.00

by whatsoever other name the said ship is or shall be named or called, beginning the adventure upon the said ship, &c., as above, and shall so continue and endure during the period as aforesaid. Should the above vessel be at sea on the expiration of this Policy, it is agreed to hold her covered until arrived at port of destination on her being moored therein twenty-four hours in good safety. (Provided that before the expiration the Assured shall have given notice of intention to so continue) at a *pro rata* monthly premium, and it shall be lawful for the said ship, &c., to proceed and sail to and touch and stay at any Ports or Places whatsoever and whencesoever without prejudice to this Insurance. The said ship, &c., for so much as concerns the assured, by agreement between the Assured and Assurers in this Policy, are and shall be valued at as follows:

Hull, Tackle, Apparel and Furniture,

Machinery and Boilers.

Rate per cent.

40.200

Forty thousand and 00/100

POLYMER LETTERS

TOUCHING the Adventure of Perils which we, the said Insurers, are contented to bear and take upon us, they are of the Same Men and War, Pirie, Enemies, Pirates, Havocs, Thieves, Jettisons, Letters of Mart and Counter-mart, Surprizes, Attackes at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People, of what Nation, Condition or Quality soever, Hierarchy of the said Sea, or of any other Violence, or of any other Cause, whatsoever, which may happen to the said Ship, or Goods therein, or to any part thereof, and in case of any Loss or Misfortune it shall be lawful to the Insured the Factors, Servants and Assigns, to sue, labor and travel for, in and about the Defense, Safeguard and Recovery of the said Ship, Goods, Wares and Merchandises, and to employ for that behalf all such Sums of Money as shall be thought fit, and the Insured will contribute according to the Rate and Quantity of the sum herein insured. And it is especially declared and agreed that no acts of the Insurer or Insured in recovering, saving or preserving the property of the said Ship, Goods, Wares and Merchandises, or in conducting and sailing the said Ship, shall constitute any forfeiture of the sum insured or his or their Assigns, at and after the rate of 3 per cent, to return 1 per cent, for every 30 consecutive days the vessel may be laid up in port, or in dock, during which period the vessel being at the risk of the Insurers, to return per cent.

Premium

1. 25

Free from average under **Three** per cent, unless general or the ship be stranded, sunk or burnt, on fire or in collision with another ship or vessel.

Claims, if any, including claim for constructive total loss, to be adjusted according to English law and practice.

With leave to sail with or without Pilots to tow and assist vessels and craft in all situations, and to be towed and to go on trial trips
With liberty to discharge, exchange, and take on board goods, specie, passengers and stores whenever the vessel may call at or proceed to, without having deemed a deviation, and with liberty to carry goods, live cattle, &c. on deck or otherwise, but warranted free from any claim in respect of jettison of cattle or goods carried on deck. Average payable on such valuation separately, or on the whole. Each voyage to be subject to separate average. In event of damage, cost of repairs to be paid without deduction of one third, whether the vessel be damaged in the voyage or at anchor. General average payable as per foreign custom if required, or per York Antwerp Rules, if in accordance with the requirement of Affreightment.

It is Agreed, that if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay any sum not exceeding the value of the ship hereby insured, in respect of injury to such other ship or vessel, itself, or its cargo and effects on board thereof, or for loss of freight then being earned upon such cargo, to such other ship or vessel, or to the owner or owners thereof, then and in such case, the said NUCREMAR shall pay the insured such proportion of three-fourths parts of said sum as the amount hereby insured bears to the value of the ship hereby insured. But this agreement is in no case to be construed as extending to any sum which the insured may become liable to pay, or shall pay in respect of loss of life or personal injury to individuals from any cause whatever.

If there be an Agent of the INSURER located at or near any place where repairs are made or proofs of loss or average taken, said Agent must be represented on the survey, if any be held, and all bills for repairs, or proofs of loss or average, must be certified to by him or they will not be allowed by this Company.

In Witness Whereof, this company has executed and attested these presents, this

day of July 19
at San Francisco, Cal.

Fred Samsen Secretary

R. Morris President

Countersigned by

General Agent

HULL TIME

ENGLISH FORM

ISSUED TO

Sacramento - Stockton Steamship Co.

Amount Insured, \$ 6,000.00

Rate, 5 % Premium, \$ 180.00

Expires, July 22, 1915.

No. 40025

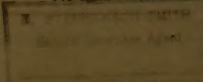
VESSEL

Steamer "Monarch"

MARINE AND TRANSPORTATION DEPARTMENT
HARTFORD
FIRE INSURANCE COMPANY
HARTFORD, CONN.



SAN FRANCISCO AGENCY
441 CALIFORNIA STREET



No. 3601
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

NOV 15 1920

F. D. MONCKTON.
CLERK.

